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K. SANKARANARAYANAN, B.A., B.L.

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THE SUPREME COURT JOURNAL

I]

JANUARY

[1966

SCOPE OF ARTICLE 358.

By

V. K. THIRUVENKATACHARI.

1. The impact of Article 358 on legislation or executive action with reference to Article 19 has to be considered under the following aspects :—

(a) Enactments by Legislatures after 26th October, 1962.

(b) Rules and Orders made under post-Proclamation enactments.

(c) Rules and Orders made after 26th October, 1962 under authority of pre-Proclamation enactments.

(d) Executive action (i) under authority of legislation, or (ii) under executive power without legislative authority.

The Proclamations made by the President under Articles 352 and 359 are as follows :

(1) G.S.R. 1415, dated 26th October, 1962 :

“ In exercise of the powers conferred by clause (1) of Article 352 of the Constitution, I, Saravapalli Radhakrishnan, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by external aggression.”

(2) G.S.R. 1464, dated 3rd November, 1962 (as amended by G.S.R. 1510, dated 11th November, 1962) :

“ In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person to move any Court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Article 352 thereof on the 26th October, 1962 is in force, *if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (IV of 1962) or any Rule or Order made thereunder.*”

2. The decisions of the Supreme Court to be referred to are the following :—

(a) *Mohan Chowdry v. Chief Commissioner*¹, dealt with Article 350 only.

(b) *Makkan Singh v. State of Punjab*², in dealing with Article 359, has considered Article 358 and in para. 8 at page 392 says :—

“ It would be noticed that as soon as a Proclamation of Emergency has been issued under Article 352 and so long as it lasts, Article 19 is suspended and the power of the Legislatures as well as the Executive is to that extent made wider. The suspension of Article 19 during the pendency of the Proclamation of Emergency removes the fetters created on the legislative and executive powers by Article 19 and if the Legislatures make laws or the executive commits acts which are inconsistent with the rights guaranteed by Article 19, their validity is not open to challenge either during the continuance of the emergency or even thereafter. As soon as the Procla-

1. A.I.R. 1964 S.C. 173.

2. A.I.R. 1964 S.C. 381.

mation ceases to operate, the legislative enactments passed and the executive actions taken during the course of the said emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under Article 19 because as soon as the emergency is lifted, Article 19 which was suspended during the emergency is automatically revived and begins to operate. Article 358, however, makes it clear that things done or omitted to be done during the emergency cannot be challenged even after the emergency is over. In other words, the suspension of Article 19 is complete during the period in question and legislative and executive action which contravenes Article 19 cannot be questioned even after the emergency is over."

(c) In *Jan Mohamed Aror Mohamed Bagan v. State of Gujarat*³, dealing with Gujarat Agricultural Market Produce Act (XX of 1964), the Supreme Court has observed :—

"Counsel submitted that the petitioner's fundamental rights under Articles 14, 19 and 31 of the Constitution were infringed by enactment of the Act and the promulgation of the Rules and Bye-laws and the exercise of the authority by the State of Gujarat and the market committee pursuant thereto. It may at once be observed that the President of India having declared in the month of December, 1962 a state of emergency in exercise of the powers reserved under the Constitution, the right to enforce the fundamental rights guaranteed under Article 19 of the Constitution remains suspended by virtue of Article 358 for the duration of the period of the emergency. On this ground alone, a large majority of the contentions raised by Counsel for the petitioner may fail. But we have heard full arguments on the petition and as the petitioner has attempted to urge that by the Act and the Rules and the Bye-laws the guaranteed freedoms under Articles 14 and 31 are also infringed, we propose to decide this petition on the merits, apart from the preliminary objection as to the suspension of Article 19 which disentitles the petitioner during the subsistence of the emergency from obtaining any relief from this Court on the footing of the breach of his fundamental right to carry on business."

3. Our submission is that Article 358 applies only to legislation with respect to Schedule VII, List I—Entry I—"Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation", when as in this case the Proclamation under Article 352 is in respect of war or external aggression, and stated to be made on account of the Emergency and to executive action authorised by such law. Similarly if the Proclamation is in respect of internal disturbance. Article 358 will apply to enactments under List II—Entry I—Public Order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power). This or other suitable formula of restriction of scope of Article 358 has to be considered and decided. The position if we consider Article 19 suspended generally for legislation as well as executive action will be a complete legislative spree both for enactments of the Legislature and delegated legislation and a freedom of executive action literally abolishing the rule of law which was a common law heritage even before the Constitution. It is submitted that part of the problem at least has arisen from a construction of Article 19 as conferring the rights enumerated in clause (1), sub-clauses (a) to (g) instead of (as is submitted) listing pre-existing rights to ban unreasonable restrictions thereon.

4. The Defence of India Act—LI of 1962—is a Law with respect to Defence of India—(List I, Entry I). Parliament has (it is submitted of design) enacted it with a Preamble referring to Article 352 Proclamation and stating that special measures had to be provided. The list of matters as to which Rules can be made under section 3 thereof apart from the general power to make Rules runs into great detail with 57 items dealing with various matters but all of them as ancillary to defence. In *Makkan Singh's case*⁴, the Supreme Court was dealing with this enactment. In *Jan Mohammeds case*³, they were dealing with a Law with respect to markets and fairs—List II, Entry 28, but having repeated the statement as to Article 358 in *Makkan*

3. W.P.No 111 of 1964 (Judgment, dated 18th August, 1965).

4. A I.R. 1964 S C. 381.

Singh's case has proceeded to deal with the case on the merits. That judgment cannot on this point be regarded as a decision of Supreme Court or as law declared by Supreme Court within the meaning of Article 141. See as to this *Ranchhodas v. Union of India*⁵ :—

“The fact is that the question was never required to be decided in any of these cases and could not, therefore, have been, or be treated as, decided by this Court.”

5. The need for greater State power arising from emergency cannot possibly apply to purely private law like List II, Entry 18,—Lands, landlord and tenant ; Entry 30—Money-lending, List III, Entry 5;—Marriage, joint family and partition, personal law ; Entry 6—Transfer of property ; Entry 8—Actionable wrongs, etc. The need is in the region of public law. The distinction was put thus by Lord Bacon:—

“I consider that it is a true and received division of law into *jus publicum* and *jus privatum*, the one being the sinews of property and the other of Government” (quoted in Keir and Lawson—Cases on Constitutional Law, Fourth Edition, page 63).

The learned authors point out at page 69 that the distinction has disappeared not only in name but in substance in England. But the classification has a relevance as to our Legislative Lists. Each entry can be classified as either clearly public law or clearly private law, with however a middle category of entries which for want of a better phrase we may term welfare law (entries like III, 20—Economic and Social Planning, 23—Social security for example, a large number of topics in which the Legislature intervenes only in the Modern Welfare State). But it is submitted that clearly private law is not within the ambit of Part XVIII at all and once we accept some limitation, it is a matter to consider whether only “Defence” but other entries may have to be included. The submission however is that “Defence” is wide enough to include every aspect of governmental control over and action in respect of person and property and has been found to be so. The 1939 and 1962, Defence of India Acts each reciting the Emergency Proclamation have effectively gathered into one enactment all the powers and control needed and actual practice here as in England affords a good test.

6. Emergency Legislation has been dealt with as a separate part of Statute Law in England. See Wade and Phillip—Constitutional Law, 6th Edition, 1960, Chapter 48, page 669 ; Halsbury's Laws of England, 3rd Edition, Volume 7, page 230—“The Crown in relation to emergencies”.

7. The Emergency provisions in Part XVIII of the Constitution have to be distinguished from the Emergency provisions of section 72 of the Government of India Act, 1919 continued by Schedule IX of the 1935 Act and also from section 102 of the 1935 Act. Section 72 only dealt with the urgency of making a law. Section 102 no doubt dealt with emergency created by War or internal disturbance but only with reference to transference of Legislative Authority. But it may be noted that the Defence of India Act, 1939 also had a Preamble reciting the Emergency Proclamation made under section 102 of the 1935 Act and the need for special measures, thereby distinguishing the law from the other enactments of the Legislature. On the other hand Article 352 and Articles 358 and 359 taken together legislate on the topic of legislative power itself and the restrictions thereon. It is in that context we have to consider whether Article 358 of its own force applies to any post-26th October, 1962 enactment, Rule or Order or executive action or it is to be restricted at all and if so, in what manner. By way of contrast Article 31 (6) reads that a law of the nature therein specified shall not be called in question in any Court on the ground that it contravenes clause (2) of that Article.

As to enactments, the words used in Article 358 are “Nothing in Article 19 shall restrict the power of the State to make any Law”. For this purpose we have to take into account how Article 19 restricts legislation. It is submitted that Article 19

5. (1961) 2 S C J. 529; (1961) M.L.J. (Cr.) 620; A.I.R. 1961 S.C. 935 at 937, Para. 10.

can be summarised as follows. The appropriate Legislature in making a law with respect to any of the matters listed in the Lists in Schedule VII may impose reasonable restrictions on the rights of citizens listed in Article 19 (1). Corollary, it shall not impose unreasonable restrictions thereon. The ban on imposing unreasonable restrictions is the restriction on legislative power. Therefore an enactment to which Article 358 applies is valid even in respect of any unreasonable restrictions imposed by it. It proceeds on the principle that during an Emergency the power of the State to control persons and property has to be greater than in ordinary times. This consideration would apply only to firstly governmental control in the region of public Law and secondly to legislation enacted by reason of Emergency. It is clear whatever authority the State requires in this connection can be fully dealt with in a Law with respect to "Defence", which will include all ancillary matters infringing or restricting rights of citizens.

Conversely it is submitted that it is clear that the Emergency can have no impact on legislation as to matters of private law: Example—List II—Entry 18—Lands—Landlord and Tenant; List III—Entry 5—Marriage—Joint family, partition, etc. The reasoning is that being in the Chapter relating to Emergency provision, Article 358 itself is limited to Emergency legislation and not all laws whatsoever. The phraseology "shall not restrict" also perhaps leads to the inference that it is a liberty which the Legislature may use if it wants, the mode of electing being by the recital of the Proclamation in the relevant enactment.

8. As to Article 19, it must be noted that the structure is that rights are first listed with a view to provide that laws on the various subject-matters shall impose only reasonable restrictions on those rights. The point is that it is not to be read as if it is clause (1) of Article 19 which for the first time conferred the rights listed therein such as the right to property, etc. The rights referred to therein are common law rights which existed before 1950 except to the extent restrained by Legislation. In this connection: see Anson's Law and Custom of the Constitution—Volume II, Part I—page 295 (IV Edition, 1935) The Crown—under the heading the right to Personal Liberty and the Rule of Law :—

"The Constitution of the Irish Free State alone among Constitutions of the British Empire provides formally a list of rights of the subject, which includes the (1) liberty of the subject; (2) the inviolability of the dwelling of each citizen; (3) freedom of conscience and the free profession and practice of religion, subject to public order and morality; (4) the right of free expression of opinion; (5) the right to assemble peaceably and without arms; (6) the right to form associations or unions; and (7) the right of every citizen to free elementary education. This enunciation of principles is, as often in the case of this Constitution, merely the translation into constitutional articles of rules which prevail in England as the result of the operation of the ordinary law. The English Rule of Law, as expounded by Dicey (Law of the Constitution, Ch. iv) includes three things: (1) the absence of arbitrary power on the part of the Government, (2) the subjection of every man, whatever his rank or position, to the ordinary law of the land and his amenability to the jurisdiction of the ordinary tribunals; and (3) the derivation of constitutional rights from the decisions of the Courts on individual cases brought before them, and the application by the Courts of the rules of private law to the Crown and its officers."

Having said this Anson proceeds to deal with these topics at page 302—Right to freedom of discussion, at page 308—Right of public meeting; at page 310—Right of association; at page 313—The Security of the subject and at page 320—The right of property.

As to the Rule of Law, see also Halsbury's Laws of England, 3rd Edition, Volume 7 page 188, paragraph 403. In terms of the phrase "rights conferred by this part" in Article 32 and Article 226, the right conferred by Article 19 is freedom from unreasonable restrictions by Law on the civil rights listed in Article 19 (1)—the right

to resist the imposition of such unreasonable restrictions and to seek the aid of the Supreme Court and the High Courts in aid of such resistance. When it is this right which is abrogated and the corresponding ban on legislative power is removed by Article 358 it is both apposite and necessary to restrict the scope of Article 358 by its context to Emergency Legislation.

9. This aspect of construction of Article 19 is well illustrated by the reasoning of the Supreme Court in cases dealing with the Article. Reference is enough to the following cases :—*Chintamanrao*⁶, *Dwarka Prasad*⁷, *Bagla Textile*⁸ and *Bijya Cotton*⁹. When it is claimed that there is an infringement of Article 19 the inquiry proceeds in a well-settled sequence. Firstly, we ascertain the pith and substance of the enactment, that is to say, which entry in the List in Schedule VII, the law is with respect to. This determines whether the enactment is within the competence of the Legislature. Secondly, we ascertain the object of the law. Thirdly, we examine whether the restrictions which the law imposes on the citizens' rights have reasonable relations to the object of the law, *i.e.*, to say whether the restrictions are reasonably necessary to effectuate the law. If the answer is yes, the restrictions are validly imposed. Otherwise the enactment is invalid.

Therefore to construe the phrase in Article 358, that nothing in Article 19 will prevent the State from making any law, we have to first enunciate what if any in Article 19 prevents the State making the law. Actually the ban of Article 19 is against the imposition of unreasonable restrictions. This ban prevents the making of a law only in the sense that the law when made is void in so far as it includes unreasonable restrictions. In Article 358 the enactment therefore is that the Law when made is valid even though the restrictions imposed thereby may be regarded as unreasonable. There are 2 objects in this, *viz.*, that there should be a greater power for the Legislature to impose restrictions during emergency than in normal times and secondly the Emergency Legislation should not be impeded in its enforcement by protracted litigation as to reasonableness of the restrictions. If this reasoning is correct then it is proper as well as necessary to restrict the scope of Article 358 to legislation consciously and statedly made on account of the Emergency.

10. While in this context it was appropriate in a case dealing with the Defence of India Act to say that Article 19 is suspended during the Emergency, what is actually dealt with is the right conferred by Article 19 of freedom from unreasonable restrictions. On the other hand, it does not mean that the right to freedom of speech or to move freely or to acquire and hold and dispose of property or to protect any profession or carry on business, is a right conferred or guaranteed by Article 19 and is suspended by Article 358 so that one could with justice say that while a proclamation of emergency is in operation, citizens do not have freedom of speech or right to carry on any business or the right to acquire or to hold and dispose of property, etc.

11. If there is "suspension" of Article 19, it is not anyhow general. In *Shyam Behari v. Union of India*¹⁰, it has been held that laws made before the Proclamation date can be challenged as contravening Article 19. It is submitted the same reasoning would apply to Rules and Orders made after 26th October, 1962 under such old enactments, as the delegated legislation cannot have higher validity than the law authorising them.

In *Bhuvaneshwari v. Mysore*¹¹, the Mysore Buildings Act IV of 1963 has been held void under Articles 14 and 19 (without any reference to Article 358). So also in *Banoji Rao v. Madhya Pradesh*¹², dealing with Abolition of Cash Grants Act, 1963, under Article 19 as well as other Articles. *Kesho Ram v. Punjab*¹³, dealt with an order

6. (1950) S C R. 759. (1950) S C J. 571.

7. (1954) S C R. 803: (1954) S C J. 238.

8. (1955) 1 S C R. 380 (1954) S C J. 637 (1954) 2 M L J. 211.

9. (1955) 1 S C R. 752 (1955) S C J. 51: (1955) 1 M L J. (S C.) 1.

10. A I R. 1963 Assam 94 (F.B.).

11. A I R. 1965 Mys 170

12. A I R. 1965 M P. 77.

13. A I R. 1964 Punj 307.

made under Defence of India Rules, 1962 and clearly Article 19 could not be pleaded. But *Chanan Ram Jayan Nath v. Punjab*¹⁴, dealt with a Licensing Order of 1963 under the Essential Commodities Act, 1955 and the ruling that during emergency it could not be questioned under Article 19 requires reconsideration on more than one ground. The same observation applies to *Sadrudin Suleman v. J. H. Patwardan*¹⁵, in which with reference to the Land Acquisition Act, 1894 as amended by Bombay Act VIII of 1958 the Court holds that Article 19 (1) (f) or (g) is no longer available to the petitioner on account of the October, 1962 Proclamation under Article 352 having regard to Article 358. On the other hand in *Thakur Bharat Singh*¹⁶, an order made after the emergency proclamation under the Public Safety Act, 1959 was held invalid as the section was void under Article 19.

12. The scope of the reference to "Executive Action" in Article 358 has to be carefully scrutinised. The whole scope of Article 358, as we have explained, is to remove the ban of Article 19 against unreasonable restrictions. Article 19 lays such ban on legislative action only and does not deal with executive action. In so far as executive action is attacked through Article 19 it is only executive action under authority of law which is void under Article 19. Therefore the reference to executive action is only to executive action under a law which could be attacked under Article 19. The Law is validated even as to unreasonable restrictions by Article 358 and the reference to executive action in this context is to executive action under authority of a law validated by Article 358 notwithstanding Article 19.

It should be noticed that executive power as such, *i.e.*, executive action apart from an authority of law is the reserve power of the State. The definition (if it can be so called) of executive power in *Halsbury's Laws of England*, 3rd Edition, Volume 7, page 192 in para. 409, is as follows :

"409. *The Executive*.—Although the legislative, executive, and judicial powers are formally distinct, it is not the case that legislative functions are exclusively performed by the Legislature, executive functions by the Executive or judicial functions by the Judiciary. Executive functions are incapable of comprehensive definition, for they are merely the residue of the functions of Government after legislative and judicial functions have been taken away. They include, in addition to the execution of the laws, the maintenance of public order, the management of Crown property and nationalised industries and services, the direction of foreign policy, the conduct of military operations, and the provision or supervision of such services as education, public health, transport, and State assistance and insurance. In the performance of these functions, public authorities are bound to issue orders which are not far removed from legislation, and to make decisions affecting the personal and proprietary rights of individuals which, while not strictly judicial are quasi-judicial in character. Discretionary action of both these types must now be considered normal on the part of the Executive.

In addition to these quasi-legislative and quasi-judicial functions, the Executive has also been empowered by statute to exercise functions which are strictly legislative and strictly judicial in character ; and in certain instances, powers are exercised which appear to partake at the same moment of legislative, executive and judicial characteristics. In view of the complexity of modern Government and the congestion of Parliamentary business, it is probably necessary that the Executive should exercise powers of subordinate legislation. Whether it should exercise purely judicial powers is more open to question."

In the same volume of *Halsbury's Laws of England* the section on the Crown relating to emergency, pages 260 to 263 may be referred to. The executive power as such is not different in emergency. Para. 562 at page 260 reads as follows :

"562. *Power to deal with emergencies*.—The Crown has the same power as a private individual of taking all measures which are absolutely and immediately

14. A I R. 1965 Punj 74.

15. A.I.R 1965 Bom. 224.

16. A.I.R. 1964 Madh. Pra. 175.

necessary for the purpose of dealing with an invasion or other emergency. It has also been suggested that the Crown has by its prerogative a right to take steps to deal with an apprehended emergency, even to the extent of interfering with the rights of the subject; but this is almost certainly incorrect. However, although this proposition cannot, probably, be maintained in its generality, the Crown has certain discretionary powers in time of war or emergency, for example, the power of requisitioning ships."

The submission therefore is that the reference to executive action in Article 358 has to be understood only as executive action under authority of laws validated under Article 358. Article 358 does not deal with executive powers as such.

13. In conclusion, it is submitted that Article 358 has to be construed and its scope limited by its place in the Chapter of the Constitution on Emergency Provisions. It is enabling in form; it provides that nothing in Article 19 shall prevent the making of a law, not that no law shall be questioned, thereby pointing to the power of the Legislature to take advantage of it by reciting the emergency proclamation to indicate that the enactment is emergency legislation. Laws with respect to entries in the lists relevant to the emergency are the laws in respect of which the ban of Article 19 against imposition of unreasonable restrictions can be disregarded of design by the Legislatures. In respect of other laws the ban of Article 19 remains in force, as it does in respect of pre-Proclamation laws, and also as regards Rules and Orders under such laws. In this view Article 19 would also in respect of such laws be subject to Presidential orders under Article 359. Article 358 deals with Executive action only as regards action under laws validated thereby.

THE LATE SRI A. V. VISWANATHA SASTRI.

Death has taken toll of an eminent and distinguished lawyer. A native of the Tadore district, descended in the line of Appayya Dikshitar of revered memory, Sri Viswanatha Sastri passed away on the 4th of January, at the age of 74, after a brilliant and successful career at the Bar at a time when he was still a most sought-after lawyer practising before the Supreme Court. Sri Sastri's life was one of rich achievement. In the early days, of his practice in Madras he was associated with the Madras Law Journal as one of its Reporters for a number of years and continued to have an abiding interest in its progress. He possessed talents of a high order which, in spite of the keen competition at the Bar, brought him quickly to the fore and enabled him to build up a lucrative practice. He earned a reputation for hard work, thorough grasp of facts, forceful presentation, and fearless and dogged advocacy. He became a Judge of the Madras High Court during 1948 and retired in 1951. With the formation of the Andhra State, he served as an *ad hoc* Judge, for a year, of the Andhra High Court as well. Short though his tenure as a Judge was, he had proved himself within the brief period to be a great Judge characterised by intellectual vigour, robust commonsense, and powers of lucid exposition. Many of his judgments (see *Champakam Dorairajan's case*; *Paramanayakam Pillai's case* etc.) form memorable expositions. After retiring from the Madras High Court, Sri Sastri became a Member of the Income-tax Investigation Commission and was its Chairman from 1952 to 1955. Later still, he served as Chairman of the Company Law Amendment Committee, and he was associated with Sri C.K. Daphtary (the present Attorney-General) in the Report submitted on the work of the Dalmia-Jain concerns.

Great though Sri Sastri was as a Judge he was even greater as a lawyer. The rich and varied experience he had accumulated as an Advocate of the Madras High Court for over 34 years, as a Judge who had seen service in two High Courts, and as one who had close and intimate knowledge of the working of the Income-tax laws and Company law, coupled with his great mastery over many branches of the law along with his command of language and gift of fluent expression enabled him to achieve phenomenal success from the moment he started practising before the Supreme Court. There was hardly any case of importance in which he was not engaged either for the one side or for the other.

Sri Sastri had practically no hobbies. His only love was the law and he cared not for any other profession. Simple and unostentatious, he believed in doing his own work and would not spare himself. His demise is sure to create a void in the ranks of the Supreme Court Bar that cannot be easily filled up.

The Supreme Court Journal (Reports)

1]

JANUARY

[1966]

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, J. C. SHAH,
J. R. MUDHOLKAR AND S. M. SIKRI, JJ.

Pandurang Dhondi Chougule and others

.. Appellants*

v.

Maruti Hari Jadhav and others

.. Respondents.

Civil Procedure Code (V of 1908), section 115—Revisional jurisdiction under—When can be invoked—Erroneous decision on a question of law by subordinate Court having no relation to questions of jurisdiction of that Court—Cannot be corrected under section 115.

While exercising its jurisdiction under section 115 of the Civil Procedure Code it is not competent to the High Court to correct errors of fact however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. As clauses (a), (b) and (c) of section 115 indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate Courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision of these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of section 115 of the Civil Procedure Code. But an erroneous decision on a question of law reached by the subordinate Court which has no relation to questions of jurisdiction of that Court, cannot be corrected by the High Court under section 115.

When Legislatures pass Acts dealing with socio-economic matters, or make provisions for the levy of sales-tax, it is realised that the operative provisions of such legislation present difficult problems of construction and so, sometimes, the Act in question provides for a revisional application to the High Court in respect of such matters. In such cases, the High Court will undoubtedly deal with the problems raised by the construction of the relevant provisions in accordance with the extent of the jurisdiction conferred on it by the material provisions contained in the statute itself. But when no such specific provision is made the High Court has to exercise its revisional jurisdiction in accordance with the limits prescribed by section 115 of the Civil Procedure Code. Does the alleged misconstruction of the statutory provision have relation to the erroneous assumption of jurisdiction or the erroneous failure to exercise jurisdiction, or the exercise of jurisdiction illegally or with material irregularity by

the subordinate Court? These are the tests laid down by section 115 and they have to be borne in mind before the High Court decides to exercise its revisional jurisdiction under it.

In a debt adjustment proceeding under the Bombay Agricultural Debtors Relief Act (XXVIII of 1939) for the adjustment of a debt due under a mortgage decree, a finding by the District Court based on the construction of the said decree to the effect that the equity of redemption of the mortgagor had been extinguished and consequently the parties no longer stood in the relationship of debtors and creditors, cannot be interfered with in revision under section 115 of the Civil Procedure Code. The construction of a decree like the construction of a document of title is no doubt a point of law. Even so, it cannot be held to justify the exercise of the High Court's revisional jurisdiction under section 115 of the Civil Procedure Code because it has no relation to the jurisdiction of the Court. Like other matters which are relevant and material in determining the question of the adjustment of debts, the question about the existence of a debt has been left to the determination of the Courts which are authorised to administer the provisions of the Bombay Agricultural Debtors Relief Act and even if in dealing with such questions the trial Court or the District Court on appeal commits an error of law it cannot be said that such an error of law would necessarily involve the question of the said Court's jurisdiction within the meaning of section 115 of the Civil Procedure Code.

Appeal by Special Leave from the judgment and Decree, dated 31st October 1960 of the Bombay High Court in Civil Revision Application No. 2131 of 1957.

S. P. Sinha, Senior Advocate (*M. I. Khawaja*, Advocate, with him), for Appellants.

C. B. Agarwala, Senior Advocate, (*A. G. Ratnaparkhi*, Advocate, with him) for Respondents.

The Judgment of the Court was delivered by

Gajendragadkar, C. J.—This appeal by Special Leave arises out of proceedings initiated under the provisions of the Bombay Agricultural Debtors Relief Act, 1939 (XXVIII of 1939) (hereinafter called 'the Act'). The respondents Maruti Hari Jadhav and two others moved the Bombay Agricultural Debt Relief Court at Karad on 26th May, 1949, for adjustment of the debt alleged to be due from them to the appellants, Pandurang Dhondi Chougule and others. Their case was that the debt in question was due under a mortgage deed executed by their grand father in favour of the grandfather of the appellants on 29th August, 1881. By this mortgage, six agricultural lands situated at Kapil in the former State of Oundh had been mortgaged to the mortgagee with possession for a sum of Rs. 575. In 1908, the respondents' predecessors-in-interest sued on this mortgage in the Court of the Sub-Judge at Kapil (Civil Suit No. 28 of 1908-09). This suit was, however, withdrawn with liberty to file a fresh suit. Then followed another suit by the respondents in the same Court for redemption of the mortgage (No. 102 of 1932-33). On 2nd September, 1936, a decree came to be passed in the said suit. According to the respondents, the decree directed them to pay Rs. 3,677-12-6 within six months from the date on which it was drawn, but the said money had not been paid; even so, the relationship between the parties continued to be that of the mortgagors and the mortgagees, and so, they were entitled to claim adjustment of the debt in question. The respondents also pleaded that the decree which was passed in the said suit was in the nature of a preliminary decree, and though the appellants were entitled to apply for making the said decree final after the expiration of the six months' period prescribed by it, they took no such action and the mortgage debt, therefore, remains unpaid and the equity of redemption vesting in the respondents is unextinguished. That, in brief, is the nature of the claim made by the respondents in the application made by them under the Act for adjustment of their debt due to the appellants.

It appears that the State of Oundh merged in the erstwhile State of Bombay and thereafter, the Act was extended to the said State. That is how the respondents commenced the present proceedings under the provisions of the Act thus extended to the State of Oundh.

The appellants also made an application for the adjustment of the debt due under the decree in Suit No. 102 of 1932-33 in the Court of the Joint Civil Judge,

Karad; but in doing so, they made it perfectly clear that they were making the application as a matter of precaution and without prejudice to their contention that the equity of redemption had been extinguished and the parties no longer stood in the relationship of creditors and debtors. In fact, it was the appellants who first made the application on 19th May, 1949, and the respondents followed by their application on 26th May, 1949. For the purpose of hearing, these two applications were consolidated by the trial Court.

At the hearing of these proceedings, the appellants raised several contentions. They urged that the mortgage was extinguished and the respondents were therefore, not entitled to claim adjustment of the debt, and they also contended that the application made by the respondents was barred by time. The trial Judge rejected the appellants' argument that the mortgage had been extinguished, and held that the equity of redemption still vested in the respondents. He, however, found that the respondents' application for adjustment of the debt was barred by time. In the result, the respondents failed and their application was dismissed.

The matter then went in appeal to the District Court, North Satara. The appellate Court held that the decree in Suit No. 102 of 1932-33 amounted to a final decree which absolutely debarred the right of the mortgagors to redeem the property in view of the fact that they had failed to pay the decretal amount within the time prescribed by it. It also agreed with the view taken by the trial Court that the respondents' application was barred by limitation. In the result, the appeal preferred by the respondents was dismissed.

The dispute then reached the Bombay High Court in its revisional jurisdiction under section 115 of the Code. Before the High Court it was urged that the Code of Civil Procedure did not apply to the State of Oundh at the relevant time; that is why by an interlocutory judgment, the High Court remanded the proceedings to the trial Court with a direction that the issue as to whether the Code of Civil Procedure applied to the State of Oundh at the relevant time, should be tried. On remand, the trial Court made a finding that the Code of Civil Procedure had been made applicable to the State of Oundh as far back as 1909-10. The High Court had also directed that the issue as to who was in possession of the property at the relevant time, should be tried; and the finding returned by the trial Court was that the appellants were in possession of the mortgaged property not as mortgagees, but as owners from 2nd March, 1937.

After these findings were returned, the revision application was argued before the High Court; and the main point which was urged before the High Court at that stage was whether the respondents' right to redeem the mortgage had been extinguished by the decree passed in Civil Suit No. 102 of 1932-33. The High Court has differed from the District Court and has taken the view that the decree did not determine the respondents' right to redeem the mortgage. In regard to the finding recorded by the Courts below that the respondents' application was barred by time, the High Court took the view that the question as to whether the application is within sixty years from the expiry of the period prescribed in the mortgage deed for repayment is entirely irrelevant inasmuch as the said application is substantially for the adjustment of debt under the decree passed in Suit No. 102 of 1932-33. On that view of the matter, the High Court has set aside the orders passed by the Courts below and has remanded the proceedings to the trial Court with a direction that the application made by the respondents for adjustment of the debt should be tried in accordance with law. It is against this order that the appellants have come to this Court by Special Leave.

Before proceeding to deal with the contentions raised before us in the present appeal, it would be convenient to set out the relevant portion of the decree in suit No. 102 of 1932-33. The operative part of the decree reads thus :—

“The plaintiffs should pay to defendants 1 and 2 Rs 3,677-12-6 within six months from today and should recover possession of the suit property as the heirs of Gopala free from the mortgage. In case the plaintiffs do not pay the amount within the prescribed time, the plaintiffs shall be deemed to have lost the right of redemption for all time.”

The District Court has held that this decree is a composite decree and on the failure of the respondents to pay the decretal amount within the time specified, their right to redeem the mortgage is extinguished by virtue of the express terms contained in it. The High Court has construed the decree as a preliminary decree and has found that the clause purporting to extinguish the equity of redemption does not affect its essential character as a preliminary decree and does not in law put an end to the relationship of creditors and debtors between the parties.

The first question which falls for our decision in the present appeal, is whether the High Court was justified in interfering with the decision of the District Court that the decree in question extinguished the respondents' right to redeem the mortgage. Mr. Sinha for the appellants contends that in reversing the conclusion of the District Court, the High Court has exceeded its jurisdiction under section 115 of the Code. In our opinion, this contention is well-founded and must be upheld.

The provisions of section 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under section 115, it is not competent to the High Court to correct errors of fact however gross they may be or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. As clauses (a), (b) and (c) of section 115 indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate Courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate Court which has no relation to questions of jurisdiction of that Court, cannot be corrected by the High Court under section 115.

The history of recent legislation in India shows that when Legislatures pass Acts dealing with socio-economic matters, or make provisions for the levy of sales tax it is realized that the operative provisions of such legislation present difficult problems of construction; and so, sometimes, the Act in question provides for a revisional application to the High Court in respect of such matters or authorises a reference to be made to it. In such cases, the High Court will undoubtedly deal with the problems raised by the construction of the relevant provisions in accordance with the extent of the jurisdiction conferred on it by the material provisions contained in the statute itself. Sometimes, however, no such specific provision is made, and the questions raised in regard to the construction of the provisions of such a statute reach the High Court under its general revisional jurisdiction under section 115 of the Code. In this class of cases, the revisional jurisdiction of the High Court has to be exercised in accordance with the limits prescribed by the said section. It is true that in order to afford guidance to subordinate Courts and to avoid confusion in the administration of the specific law in question, important questions relating to the construction of the operative provisions contained in such an Act must be finally determined by the High Court; but in doing so, the High Court must enquire whether a complaint made against the decision of the subordinate Court on the ground that it has misconstrued the relevant provisions of the statute, attracts the provisions of section 115. Does the alleged misconstruction of the statutory provision have relation to the erroneous assumption of jurisdiction, or the erroneous failure to exercise jurisdiction, or the exercise of jurisdiction illegally or with material irregularity by the subordinate Court? These are the tests laid down by section 115 of the Code and they have to be borne in mind before the High Court decides to exercise its revisional jurisdiction under it.

The question has been recently considered by this Court in *Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee and others*¹, and *Vora Abbasbhai Ali-mahomed v. Haji Gulamnabi Haji Saffibhai*². The effect of these two decisions clearly is that a distinction must be drawn between the errors committed by subordinate Courts in deciding questions of law which have relation to, or are concerned with questions of jurisdiction of the said Court, and errors of law which have no such relation or connection. It is, we think, undesirable and inexpedient to lay down any general rule in regard to this position. An attempt to define this position with precision or to deal with it exhaustively may create unnecessary difficulties. It is clear that in actual practice, it would not be difficult to distinguish between cases where errors of law affect, or have relation to, the jurisdiction of the Court concerned, and where they do not have such a relation.

Considering the point raised by Mr. Sinha in the light of this position, it seems to us that the High Court was in error in assuming jurisdiction to correct what it thought to be the misconstruction of the decree passed in Civil Suit No. 102 of 1932-33. As we have already seen, in the present debt adjustment proceedings, one of the points which arose for decision was whether the mortgage debt was subsisting at the time when the respondents made their application, and the District Court had found that the respondents' equity of redemption had been extinguished. This finding was based on the construction of the said decree. It is difficult to see how the High Court was justified in reversing this finding under section 115 of the Code. The construction of a decree like the construction of a document of title is no doubt a point of law. Even so, it cannot be held to justify the exercise of the High Court's revisional jurisdiction under section 115 of the Code because it has no relation to the jurisdiction of the Court. Like other matters which are relevant and material in determining the question of the adjustment of debts, the question about the existence of the debt has been left to the determination of the Courts which are authorised to administer the provisions of the Act ; and even if in dealing with such questions, the trial Court or the District Court commits an error of law, it cannot be said that such an error of law would necessarily involve the question of the said Court's jurisdiction within the meaning of section 115 of the Code. We are, therefore, satisfied that on the facts of this case, the High Court exceeded its jurisdiction in interfering with the conclusion of the District Court that the decree in question had extinguished the respondents' equity of redemption.

This conclusion is enough to dispose of the present appeal, because the main ground on which the High Court has reversed the concurrent decision of the Courts below dismissing the respondents' application for adjustment of the debt, is furnished by its finding that the decree in question did not extinguish the equity of redemption vesting in the respondents. In fact, it was as a result of this decision that the High Court reversed the finding of the Courts below that the respondent's application was barred by time. Having regard to the fact that we are inclined to take the view that the High Court exceeded its jurisdiction in reversing the finding of the District Court as to the effect of the decree in question, we do not think it is necessary to consider the further question as to whether the High Court was right in holding that the decree in question was a preliminary decree and the clause which purported to extinguish the equity of redemption was inoperative and invalid and as such, it did not affect the essential character of the decree as a preliminary decree.

The result is, the appeal is allowed, the order passed by the High Court is set aside and that of the District Court restored. There would be no order as to costs.

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, Chief Justice, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Daya Ram and others

.. Appellants *

v.

Shyam Sundari and others

.. Respondents.

*Transfer of Property Act (IV of 1882), section 51—Scope and applicability.**Civil Procedure Code (V of 1908), Order 22, rule 4—Death of sole respondent pending appeal—Only some of the legal representatives of deceased impleaded within time—Omission to bring on record all the legal representatives, if causes the appeal to abate.*

Where the defendant to prevent certain lands—to which he claimed full ownership—from being acquired under the Land Acquisition Act by the Kanpur Improvement Trust entered into an agreement with the Improvement Trust agreeing to convey to the Improvement Trust a certain portion of the lands free of cost in lieu of the betterment contribution and also to construct in the remaining portion of the lands certain shops and houses in accordance with plans approved by the Improvement Trust and before he could complete the constructions a suit was filed by the plaintiff claiming rights to 1/3 share in the property but nevertheless the defendant ignoring the claims of the plaintiff went on to complete the constructions :

Held, the defendant could not claim compensation under section 51 of the Transfer of Property Act for the improvements effected by him. His acts were analogous to those of a trespasser who with notice of the claim of the true owner had effected improvements on the property. If the property had been acquired under the Land Acquisition Act compensation at the market value with the solatium would have been provided and the plaintiff would have been entitled to a third share in that compensation. There was therefore no question of the defendant salvaging something for the co-owners and on that ground being entitled to plead an equity based on such an act. Nor was there any substance in the argument derived from the analogy of improvements effected by co-owners or co-sharers, for admittedly the defendant dealt with the property as full owner denying the claims of the plaintiff.

Where pending an appeal the sole respondent dies and the appellant after a diligent enquiry impleads the heirs of the deceased respondent so far as known to him within the time allowed by law, but omits to bring on record some of the heirs, this omission in the absence of fraud or collusion, would not result in the abatement of the appeal. The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and *bona fide* enquiry ascertains who the legal representatives of the deceased defendant or respondent are and brings them on record within the time limited by law there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and that a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record.

Though this is so when once it is brought to the notice of the Court hearing the appeal that some of the legal representatives of the deceased respondent have not been brought on record and the appellant is thus made aware of this default on his part, it would be his duty to bring these others on record, so that the appeal could be properly constituted. In other words, if the appellant should succeed in the appeal it would be necessary for him to bring on record these other representatives whom he has omitted to implead originally.

Appeal from the Judgment and Decree, dated 26th February, 1957 of the Allahabad High Court in F.A. No. 487 of 1945.

S. K. Kapur, Advocate-General for the State of Punjab, (S. Murty and K. K. Jain, Advocates, with him), for Appellants.

G. N. Dikshit, Advocate, for Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is an appeal by a certificate granted by the High Court of Allahabad under Article 133 (1) (b) of the Constitution and represents,

and that is our hope, the last stage of a litigation which has lasted over forty years between the deceased respondent—Shyam Sundari—and Mata Din, the father of the appellants.

The following facts are necessary to be stated in order to appreciate the very short point that arises for consideration in this appeal. The father of Shyam Sundari—the deceased respondent was one Babu Har Charan Lal. He was the owner along with his two brothers—Kanhaiya Lal and Sheo Narain, of plots 599 and 600 situated in Sisamau in Kanpur on which there existed certain petty constructions. The three brothers were separated in interest and were each entitled to a third share. Babu Har Charan Lal died in December, 1915 leaving behind him surviving his widow—Tulsa Kunwar and an only daughter—Shyam Sundari. Tulsa Kunwar died on 6th June, 1919 but even before her death Kanhaiya Lal and Sheo Narain, the two brothers of her husband, claiming a full interest in those plots, sold them to Lal Mata Din, the father of the appellants by two registered deeds of sale for Rs. 7,000 on the footing that each was entitled to a half share, ignoring the rights of Tulsa Kunwar who was admittedly no party to that transaction of sale. After the death of Tulsa Kunwar, Shyam Sundari made a claim against the purchaser for her third share in the property as the heir of her father, but as this was denied to her, she filed in March, 1922 a suit numbered as 20 of 1922 in the Court of the Second Subordinate Judge, Kanpur, for the recovery of possession of her third share in these two plots.

But before this suit was filed certain matters transpired between Mata Din and the Kanpur Improvement Trust which have to be referred to because the agreement entered into on 15th December, 1921 between the Improvement Trust and Mata Din as a result of these negotiations and the steps taken by Mata Din in consequence thereof are relied on by learned Counsel for the appellant in support of the contentions raised by him in the appeal. It appears that there was a proposal for the acquisition of these plots by the Kanpur Improvement Trust, that the proposed acquisition was objected to by Mata Din and that the proposal was abandoned by the Improvement Trust as a result of the agreement entered into by Mata Din whereby he agreed to convey to the Trust 895.35 sq. yds. of land free of cost, in lieu of the betterment contribution, and also agreed to construct on the remaining part of the premises, shops and houses in accordance with plans approved by the Improvement Trust. The relevance of this agreement and of the constructions effected by Mata Din in pursuance of the agreement we shall reserve for consideration later.

The principal defence of Mata Din to the Suit No. 20 of 1922 was based on the allegation that Har Charan Lal was joint in status and in interest with his two brothers and that on the former's death without male issue the family property survived to the other two brothers. The trial Court found against the plaintiff—Shyam Sundari on this issue and dismissed her suit. She filed an appeal to the High Court and the learned Judge allowed her appeal. At the stage of the hearing of the appeal a claim was made by Mata Din that he was entitled to compensation for the buildings erected by him on the ground that he had effected improvements to the property (these being the shops and houses which he undertook to construct under the agreement with the Improvement Trust) *bona fide* and he rested his case in this regard on the terms of section 51 of the Transfer of Property Act. The learned Judges, however, disallowed this claim for compensation. The claim to compensation for improvements effected had not been raised in the pleadings, nor urged in the trial Court and the learned Judges observed :

“No definite allegation of improvement of the property was raised in his written statement. No sum spent on the building was specified and there is very good reason, as we have said, to believe that Mata Din had no building on this land on the 1st December, 1921. We cannot for a moment believe that the building was finished by the 1st December, 1921. He had notice of the plaintiff's claim by March, 1922, and if he went on after getting notice of the plaintiff's claim to finish the completion of the building he was taking a risk and he must accept the consequences.”

Allowing the appeal the learned Judges granted Shyam Sundari a decree for possession of a third share of the plots specified in the lists attached to the plaint. That decree has now become final.

When Shyam Sundari sought execution of this decree, there was again trouble raised by Mata Din and when she obtained joint formal possession of her third share of the property under the orders of the executing Court Mata Din filed an appeal to the High Court and the learned Judges held that Shyam Sundari was not entitled on the basis of the decree which she had obtained in Suit No. 20 of 1922 to any specific portion of the land. All that she was entitled to, the learned Judges said, was to symbolical possession of the third of the plots 599 and 600 and that she ought to file a separate suit for partition in which this right of hers could be worked out.

In pursuance of this finding and decree of the High Court, Shyam Sundari filed the suit out of which the present appeal arises—Suit No. 9 of 1939—against the present appellants who are the sons of Mata Din, who had died in 1933. The claim made in the suit was for determining the third share of the lands and for allotting the same to her and if there were buildings on such a plot the plaint prayed that they might either be given over to her or be permitted to be demolished by the defendants, with a further prayer that the plaintiff might be put in possession of her third share as ascertained. She also claimed the other usual reliefs of mesne profits and costs. Several defences were raised to this suit, some of which were obviously frivolous. Such, for instance, were the pleas that the suit was barred by limitation or by section 47 of the Civil Procedure Code or that she had lost title by adverse possession on the part of the defendants. The trial Judge overruled these technical defences and held that her suit for the ascertainment and possession of a third share was maintainable. But having so held, instead of granting her a decree for a third share of the plots to which she had obtained a right in Suit No. 20 of 1922, he granted her a decree for Rs. 2,620 as representing the third share of the price of the land in question. She was also granted a decree for Rs. 2,000 as her share of the materials on the land at the date of the sale to Mata Din, but this portion of the decree was, on appeal by the appellants, deleted by the learned Judges of the High Court and need not, therefore be considered. Her claim to the allotment in specie of a third share in the suit land was disallowed to her on the ground that Mata Din had constructed certain buildings on the land and that it was not possible to allot to her a third share in the land without interfering with the buildings and that for this reason the defendants—the appellants before us were entitled to the equity of requiring the plaintiff Shyam Sundari to sell her share to them or, in other words, be compelled to take the money value of the land in lieu of her share in it. Shyam Sundari appealed from this decree to the High Court. The appeal was allowed by the High Court which granted her a decree for a share of the property. The decree passed in favour of the respondent by the High Court runs in these terms :

“A preliminary decree for partition of the appellants' 1/3rd share in plots 599 and 600, area 1,122.99 sq yards be passed and that it is hereby directed that the appellant shall be allotted in her share the land on which the least valuable constructions stand and that it shall be open to the respondents to remove their constructions from the site allotted in the appellant's share, but if they do not, the appellant shall be entitled to take possession over them without any payment and shall become their owner.”

It is the correctness of this decree for partition and possession that is challenged by the appellants who, as stated before, have obtained a certificate of fitness from the High Court.

The ground upon which the learned trial Judge considered that the defendants were entitled to this equity was that Mata Din had made the constructions on the land, being obliged to do so by reason of the agreement with the Trust and that he effected these improvements as a co-owner and not as trespasser and that in entering into an agreement with the Trust he did not act *mala fide* but to save the land in dispute for himself and his co-owners from being acquired by the Trust and that as Shyam Sundari did not assert her title before the construction started it would not be equitable to permit her to obtain a share in the land on which the new constructions stood and that it was within the jurisdiction of the Court trying a partition suit

to transfer to co-sharers at its market price the shares of others instead of dividing the property and that as it was impracticable to divide the property without demolishing some at least of the constructions, the defendants were entitled to insist that they should be permitted to purchase the third share of Shyam Sundari in the vacant land. In reversing this judgment, the learned Judges of the High Court held that the action of Mata Din in purchasing the property was not *bona fide*. Mata Din had put forward, in the previous litigation—Suit No. 20 of 1922—a defence based on section 51 of the Transfer of Property Act and in that he failed. The agreement with the Trust was on 15th December, 1921 and Shyam Sundari's Suit No. 20 of 1922 was filed in March, 1922. It was, therefore, clear that whether or not the constructions were commenced before the suit was instituted, they were completed with knowledge of the claim of Shyam Sundari to which, as the Courts have now found, he had no defence. The agreement with the Trust could not justify Mata Din's action because the Trust could not agree with a person who was not the owner of the property to construct buildings on another's property. It would have been open to Mata Din to have informed the Trust immediately he got notice of the claim of Shyam Sundari that only a 2/3rd share in the site belonged to him, but he did not do so but completed the constructions ignoring the claims of Shyam Sundari. They could not therefore, take advantage of their own acts and conduct and plead an equity based upon their wrongful acts. On this line of reasoning the learned Judges held that there was no equity in favour of Mata Din and his heirs and hence passed a decree in favour of Shyam Sundari in the terms we have extracted earlier.

Learned Counsel for the appellants, though he referred to the Partition Act, could not obviously rely upon it because the procedure adopted by the learned trial Judge was not one which was sanctioned by that enactment, *viz.*, sale of the entire property, which is the subject of partition. He, therefore, urged before us that at the stage when Mata Din entered into the agreement with the Improvement Trust the position was that the interest of the co-sharers was in jeopardy and they ran the risk of losing the entire property by the same being acquired under the Land Acquisition Act and that by his act in entering into the agreement the co-owners had been saved the property now in dispute and that, in the circumstances, the agreement was one which was entered into *bona fide* and that he could claim an equity based on the constructions erected in pursuance thereof. We do not see any substance in this argument. If the property had been acquired under the Land Acquisition Act compensation at the market value with the solatium would have been provided and Shyam Sundari would have been entitled to a third share in that compensation. There is, therefore, no question of Mata Din salvaging something for the co-owners; and on that ground being entitled to plead an equity based on such an act. Nor is there any substance in the argument derived from the analogy of improvements effected by co-owners or co-sharers, for admittedly Mata Din dealt with the property as full owner denying the claims of Shyam Sundari to a third share in the property. Virtually it would be seen that the equity pleaded is based on the principle underlying section 51 of the Transfer of Property Act, and as we have seen, the argument calling in aid this provision of law had been urged before the High Court in the appeal against the decree in Suit No. 20 of 1922 and had been rejected for the reason we have extracted earlier, and these reasons clearly negative all *bona fides* in the construction of these buildings. In these circumstances, we consider that the learned Judges were justified in treating the acts of Mata Din as those of a trespasser who, with notice of the claim of the true owner, had effected constructions on the property. It is obvious that in those circumstances he could claim no special equity based upon his having *bona fide* put common property to use and effect improvements on it. We consider, therefore, that the decree passed by the High Court is not open to objection and the appeal has accordingly to fail.

Before concluding, however, it is necessary to deal with a preliminary objection raised by learned Counsel for the respondent that the appeal had abated and that it ought to be dismissed *in limine* on that ground. The decree passed in the case, as would have been seen, was for partition and delivery of separate possession of a

1/3rd share in the two plots Nos. 599 and 600 of Sisamau, Kanpur in favour of Shyam Sundari and in the appeal filed by the heirs of Mata Din she was the sole respondent. The High Court granted a certificate of fitness under Article 133 (1) (b) on 13th September, 1957 and the appeal was declared admitted by the High Court on 27th November, 1957 and thereupon under the relevant provisions of the Civil Procedure Code the appeal became pending in this Court. Shyam Sundari was stated to have died sometime in April, 1959 and thereafter the appellants took steps to implead her legal representatives. In the petition filed by the appellants for the purpose, they stated that the heirs of the deceased were her husband and four sons, and it was prayed that these might be impleaded as the legal representatives of the deceased. The petition was granted. The substitution was made and the legal representatives who were impleaded respondents have entered appearance and are contesting the appeal and it is on their behalf that the preliminary objection is being raised. In the Statement of Case which these respondents filed in October, 1962, they took the plea that the appeal had abated since a son Kunwar Bahadur and a daughter Laxmi-bai of Shyam Sundari had not been brought on record as legal representatives within the time allowed by law. No allegation, however, has been made either suggesting that the appellants had not made diligent and *bona fide* enquiries regarding who the legal representatives of Shyam Sundari were or that they had any motive fraudulent or otherwise in not adding the son and the daughter in the array of legal representatives in their petition under Order 22, rule 4, Civil Procedure Code. The question for consideration is whether when an appellant has impleaded heirs of the deceased respondent so far as known to him within the time allowed by law, but has omitted to bring on record some of the heirs, this omission results in the abatement of the appeal.

As we shall point out presently, the question in such cases is whether the estate of the deceased is properly and sufficiently represented for the purpose of defending the appeal and whether, in law, the estate can be so represented even when some of the heirs are, without fraud or collusion, omitted to be brought on record. Before, however, examining this point, it would be convenient to refer to and deal with the authorities relied on by Counsel for the respondent in support of his submission. Learned Counsel for the respondent relied on two decisions of this Court—*The State of Punjab v. Nathu Ram*¹ and *Ram Sarup v. Munshi*² as leading to this result. In the first case the Government of Punjab acquired certain parcels of land belonging to two brothers *L* and *N* who refused to accept the compensation offered to them and applied to the Government to refer the dispute to arbitration. The matter was thereafter referred to arbitration under the Punjab Land Acquisition (Defence of India) Rules, 1943 and an award was passed in favour of the brothers. The Government appealed against the award to the High Court and during the pendency of the appeal before the High Court one of the brothers died and no application was made for bringing on record his legal representatives within the time limited by law. A preliminary objection was raised to the hearing of the appeal by the surviving brother who claimed that the entire appeal had abated by reason of the legal representatives of the deceased brother not having been brought on record in time. The learned Judges of the High Court accepted this contention and dismissed the entire appeal. The State of Punjab came up in appeal to this Court and this Court held that in the case of a joint decree the decree was indivisible and in such a case the appeal against one respondent alone cannot be proceeded with and would have to be dismissed as a result of the abatement of the appeal against the deceased respondent for otherwise there would be two inconsistent decrees. This Court found that the brothers had made a joint claim and got a joint decree and it was that decree which was joint and indivisible that was being challenged in appeal before the High Court. The appeal of the State was dismissed. We do not see how this decision helps the respondent but shall examine it after referring to the other decision of this Court on which the learned Counsel sought support. In *Ram Sarup v. Munshi*²

1. (1951) 2 S.C.J. 637 : (1961) 2 M.L.J. (S.C.) 182 : (1961) 2 An.W.R. (S.C.) 182 : (1962) 2 S.C.R. 636 : A.I.R. 1962 S.C. 89.
 2. (1963) 3 S.C.R. 858 : A.I.R. 1963 S.C. 553.

here had been a pre-emption decree and an appeal was preferred from it by the vendees. One of the appellants died pending the appeal and his legal representatives were not brought on record. As the decree was a joint one and as part of the decree had become final by reason of the abatement it was held that the entire appeal must be held to have abated. The principle upon which these cases rest have no application to the case before us. The first of the above decisions was a case where a joint decree had been passed in favour of two individuals and that was challenged in the appeal before the High Court. It was common ground that the appeal against one of the joint decree-holders had abated owing to none of his legal representatives having been impleaded within the time limited by law. There was therefore, none on the record who could represent the estate of the deceased respondent. In such a case the only question that could arise would be whether the abatement which *ex concessis* took place as regards one of the respondents should have effect partially, *i.e.*, confined to the share of the deceased respondent as against whom the appeal was abated, or whether it would result in the abatement of the entire appeal. This, it is obvious, would depend on the nature of the decree and the nature of the interest of the deceased in the property. If the decree is joint and indivisible, it would be apparent that the abatement would be total. It was precisely a question of this sort that was raised by *Nathu Ram's case*¹. The other decision in *Ram Sarup v. Munshi*² is also an illustration of the identical principle, and that is the reason why this Court proceeded to consider elaborately the nature of the interest *inter se* of the vendees who had filed the appeal. It is clear that in the appeal now before us no such question of partial or total abatement arises.

The case before us is entirely different. There was a decree in favour of Shyam Sundari—and that is the subject-matter of this appeal. The question is whether there has been abatement of the appeal against Shyam Sundari. Shyam Sundari's heirs have been brought on record within the time allowed by law and the only question is whether the fact that two of the legal representatives of Shyam Sundari have been omitted to be brought on record would render the appeal incompetent. This turns on the proper interpretation of Order 22, rule 4 of the Civil Procedure Code :

"4. (1) Where a sole defendant or sole surviving defendant dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit.

4. (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

When this provision speaks of "legal representatives" is it the intention of the Legislature that unless each and every one of the legal representatives of the deceased defendant, where these are several, is brought on record there is no proper constitution of the suit or appeal, with the result that the suit or appeal would abate? The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and *bona fide* enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and that a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record. The principle of this rule of law was thus explained in an early decision of the Madras High Court in *Kadir v. Muthukrishna Ayyar*³. The facts of that case were that when the defendant died the first defendant before the Court was impleaded as his legal representative. The impleaded person raised no objection that he was not the sole legal representative of the deceased defendant and that there were others who had also to be joined. In these circumstances, the Court observed :

"In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate If this were not the

1. (1921) 2 S.C.J. 637 : (1961) 2 M.L.J. (S.C.) 182 : (1961) 2 A.W.R. (S.C.) 182 : 553.
2. (1963) 3 S.C.R. 858 : A.I.R. 1963 S.C.
3. (1902) 12 M.L.J. 368 : I.L.R. 26 Mad. 230.

law, it would, in no few cases, be practically impossible to secure a complete representation of a party dying pending a suit and it would be specially so in the case of a Muhammadan party and there can be no hardship in a provision of law by which a party dying during the pendency of a suit, is fully represented for the purpose of the suit, but only for that purpose, by a person whose name is entered on the record in place of the deceased party under sections 365, 367 and 368 of the Civil Procedure Code, though such person may be only one of several legal representatives or may not be the true legal representative."

This, in our opinion, correctly represents the law. It is unnecessary, here, to consider the question whether the same principle would apply when the person added is not the true legal representative at all. In a case where the person brought on record is a legal representative we consider that it would be consonant with justice and principle that in the absence of fraud or collusion the bringing on record of such a legal representative is sufficient to prevent the suit or the appeal from abating. We have not been referred to any principle of construction of Order 22, rule 4 or of the law which would militate against this view. This view of the law was approved and followed by Sulaiman, Acting C.J., in *Muhammad Zafaryab Khan v. Abdul Razzaq Khan*¹. A similar view of the law has been taken in Bombay—see *Jehrabai Sadullakhan Mokasi v. Bismillahi Sadraddin Khaji*²—as also in Patna—see *Lilo Sonar v. Jhagra Sahu*³, and *Shib Dutta Singh v. Sheikh Karim Bakhas*⁴, as well as in Nagpur—*Abdul Bahi v. R. B. Bansilal Abirchand Firm, Nagpur*⁵. The Lahore High Court has also accepted the same view of the law—see *Mst. Umrao Begum v. Rehmat Illahi*⁶. We are, therefore, clearly of the opinion that the appeal has not abated.

The next question is about the effect of the appellant having omitted to include two of the heirs of Shyam Sundari, a son and a daughter who admittedly had an interest in the property, and the effect of this matter being brought to the notice of the Court before the hearing of the appeal. The decisions to which we have referred as well as certain others have laid down, and we consider this is also correct, that though the appeal has not abated, when once it is brought to the notice of the Court hearing the appeal that some of the legal representatives of the deceased respondent have not been brought on record, and the appellant is thus made aware of this default on his part, it would be his duty to bring these others on record, so that the appeal could be properly constituted. In other words, if the appellant should succeed in the appeal it would be necessary for him to bring on record these other representatives whom he has omitted to implead originally. The result of this would be that the appeal would have to be adjourned for the purpose of making the record complete by impleading these two legal representatives whom the appellant had omitted to bring on record in the first instance. This is the course which we would have followed but we had regard to the fact that the suit out of which this appeal arises was commenced in 1939 was still pending quarter of a century later and having regard to this feature we considered that unless we were satisfied that the appellant had a case on the merits on which he could succeed, it would not be necessary to adjourn the hearing for the purpose of formally bringing on record the omitted legal representatives. We therefore proceeded to hear the appeal and as we were satisfied that it should fail on the merits we did not think it necessary to make the record complete.

The appeal fails and is dismissed with costs.

V.K.

Appeal dismissed.

1. (1928) I.L.R. 50 All. 857.
2. A.I.R. 1924 Bom. 420
3. (1924) I.L.R. 3 Pat 853.

4. (1925) I.L.R. 4 Pat. 320.
5. I.L.R. (1944) Nag. 577.
6. (1939) I.L.R. 20 Lah. 433.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND RAGHUBAR DAYAL, JJ.
 Deo Kuer and another .. Appellants*

v.

Sheo Prasad Singh and others

.. Respondents.

Specific Relief Act (I of 1877), section 42, Proviso—Applicability—Property standing attached under section 145, Criminal Procedure Code (V of 1908)—Suit for declaration of title—Competency—Plaintiff if bound to ask for further relief of delivery of possession.

In a suit for declaration of title to property filed when it stands attached under section 145, Criminal Procedure Code, it is not necessary to ask for the further relief of delivery of possession. The fact if it be so, that the Magistrate holds possession on behalf of the party whom he ultimately finds to have been in possession is irrelevant. The property was in *custodia legis* and it was not necessary for the plaintiff in a suit for declaration of title to such property to ask for possession as the defendant was not in possession and not in a position to deliver possession to the plaintiff. A suit for mere declaration of title is competent in the circumstances.

Dukhan Ram v. Ram Nanda Singh, A I.R. 1961 Pat. 425, overruled.

Appeal from the Judgment and Decree dated 26th September, 1957 of the Patna High Court in Appeal from Original Decree No. 253 of 1949.

Sarjoo Prasad, Senior Advocate (*R. C. Prasad*, Advocate, with him), for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (*D. Goburdhun*, Advocate, with him), for Respondents Nos. 1 to 4 and 6.

The Judgment of the Court was delivered by

Sarkar, J.—This appeal arises out of a suit brought by the appellants in 1947 for a declaration that the defendants first party had acquired no right or title to a property under certain deeds and that the deeds were inoperative and void. The suit was decreed by the trial Court but on appeal by the defendants first party to the High Court at Patna that decree was set aside. The High Court having granted a certificate of fitness, the appellants have brought the present appeal. The defendants first party have alone contested the appeal and will be referred to as the respondent.

The High Court held that as the appellants were not in possession of the property at the date of the suit as found by the learned trial Judge and the respondents were, their suit must fail under the proviso to section 42 of the Specific Relief Act as the appellants had failed to ask for the further relief of recovery of possession from the respondents. In this view of the matter the High Court did not consider the merits of the case. The fact however was that at the date of the suit the property was under attachment by a Magistrate under powers conferred by section 145 of the Code of Criminal Procedure and was not in the possession of any party. This fact was not noticed by the High Court but the reason why it escaped the High Court's attention does not appear on the record.

The only point argued in this appeal was whether in view of the attachment, the appellants could have in their suit asked for the relief for delivery of possession to them. If they could not, the suit would not be hit by the proviso to section 42. The parties seem not to dispute that in the case of an attachment under section 146 of the Code as it stood before its amendment in 1955, a suit for a simple declaration of title without a prayer for delivery of possession is competent. The respondents contend that the position in the case of an attachment under section 145 of the Code is different, and in such a case the Magistrate holds possession for the party who is ultimately found by him to have been in possession when the first order under the section was made. It was said that a suit for declaration of title pending such an attachment is incompetent under the proviso to section 42, unless recovery of

possession is also asked for. It appears that the attachment under section 145 in the present case is still continuing and no decision has yet been given in the proceedings resulting in the attachment.

In our view, in a suit for declaration of title to property filed when it stands attached under section 145 of the Code, it is not necessary to ask for the further relief of delivery of possession. The fact, if it be so, that in the case of such an attachment, the Magistrate holds possession on behalf of the party whom he ultimately finds to have been in possession is, in our opinion, irrelevant. On the question however whether the Magistrate actually does so or not, it is unnecessary to express any opinion in the present case.

The authorities clearly show that where the defendant is not in possession and not in a position to deliver possession to the plaintiff, it is not necessary for the plaintiff in a suit for a declaration of title to property to claim possession : see *Sunder Singh Mallah Singh Sanatan Dharam High School Trust v. Managing Committee, Sunder Singh Mallah Singh Rajput High School*¹. Now it is obvious that in the present case, the respondents were not in possession after the attachment and were not in a position to deliver possession to the appellants. The Magistrate was in possession, for whomsoever, it does not matter, and he was not of course a party to the suit. It is pertinent to observe that in *Nawab Humayun Begam v. Nawab Shah Mohammad Khan*², it has been held that the further relief contemplated by the proviso to section 42 of the Specific Relief Act is relief against the defendant only. We may add that in *K. Sundaresa Iyer v. Sarvajana Sowkiabul Virdhi Nidhi, Ltd.*³, it was held that it was not necessary to ask for possession when property was in *custodia legis*. There is no doubt that property under attachment under section 145 of the Code is in *custodia legis*. These cases clearly establish that it was not necessary for the appellants to have asked for possession.

In *Dukhan Ram v. Ram Nanda Singh*⁴, a contrary view appears to have been taken. The reason given for this view is that the declaratory decree in favour of the plaintiff would not be binding on the Magistrate and he was free in spite of it to find that possession at the relevant time was with the defendant and deliver possession to him. With great respect to the learned Judge deciding that case, the question is not whether a declaratory decree would be binding on the Magistrate or not. The fact that it may not be binding would not affect the competence of the suit. The suit for a declaration without a claim for the relief for possession would still be competent in the view taken in the cases earlier referred to, which is, that it is not necessary to ask for the relief of delivery of possession where the defendant is not in possession and is not able to deliver possession, which, it is not disputed, is the case when the property is under attachment under section 145 of the Code. We think that *Dukhan Ram's case*⁴, had not been correctly decided. We may add that no other case taking that view was brought to our notice.

For these reasons, we hold that the suit out of which this appeal has arisen was competent. We, therefore, allow the appeal but as the merits of the case had not been gone into by the High Court, the matter must go back to that Court for decision on the merits. The appellant will get the costs here and below.

K.S.

Appeal allowed.

1. (1938) 1 M.L.J. 359 : L.R. 65 I.A. 106.

2. (1943) 2 M.L.J. 76 : A.I.R. 1943 P.C. 94.

3. I.L.R. (1939) Mad 986.

4. A.I.R. 1961 Pat. 425.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, RAGHUBAR DAYAL AND R. S. BACHAWAT, JJ.

Jagdish Prasad

.. Appellant*

v.

The State of Uttar Pradesh

.. Respondent.

Prevention of Food Adulteration Act (XXXVII of 1954), section 16 (1)—Construction—Second offence entailing heavier punishment—If should be of same kind as first.

The words 'second offence' in sub-section (1) of section 16 of the Prevention of Food Adulteration Act must mean, any act which is an offence under any of the clauses in the sub-section which has been done later in point of time after a conviction for an offence under the Act, no matter whether the acts or omissions constituting the two offences are of the same type or not.

Appeal by Special Leave from the Judgment and Order dated 10th November, 1964 of the Allahabad High Court in Criminal Revision No. 2097 of 1963.

B. C. Misra, Advocate, for Appellant.

O. P. Rana, Advocate, for Respondent.

The Judgment of the Court was delivered by

Sarkar, J.—This appeal raises a question of construction of sub-section (1) of section 16 of the Prevention of Food Adulteration Act, 1954. The sub-section in providing for punishment for breaches of the Act states, "for a second offence, with imprisonment for a term which may extend to two years and with fine". In respect of the first offence it provides for a smaller sentence. The question is whether the appellant was liable to punishment for a second offence. The order of this Court granting leave to appeal confined it only to that question.

It appears that on an earlier occasion the appellant kept foodstuffs for sale in a container without covering it as required by sub-rule (3) of rule 49 of the Rules made under the Act and was thereupon convicted under section 16 and sentenced to a fine of Rs. 40 as for a first offence. This time he has been convicted for selling food-stuff which had been coloured with a dye the use of which was prohibited by rule 28 of the same Rules.

Learned Counsel for the appellant stated that the present was not a second offence. If we have understood his arguments correctly, and we confess to some difficulty in understanding them, he said that the second offence contemplated is an offence constituted by the same kind or type of act for which he had been convicted under the Act on an earlier occasion. According to him, if the present conviction was for keeping foodstuff intended for sale in a container not covered as required by sub-rule (3) of rule 49, then only it would have been for a second offence, but as the conviction in the present case was for selling foodstuff coloured with prohibited dye, it was not for a second offence.

This contention does not seem to us to be acceptable. The real question is. What do the words 'second offence' mean? Learned Counsel for the appellant referred us to Webster's New World Dictionary where one of the meanings of the word 'second' has been stated to be 'of the same kind as another'. That meaning cannot be attributed to that word in the sub-section. It increases the penalties as the offences are 'first', 'second' or 'third'. Thus it states, "for a third and subsequent offences, with imprisonment for a term which may extend to four years and with fine". The word 'subsequent' makes it clear that the words 'first', 'second' and 'third' were intended to indicate things happening one after another in point of time. Sub-section (2) of section 16 also leads to the same conclusion. It says, "If any person convicted of an offence under this Act commits a like offence afterwards", the subsequent conviction and the penalty imposed with his name and address may be published in a newspaper at his expense. The word 'afterwards'

clearly indicates that the statute was contemplating offences committed subsequently and was indicating a sequence of time. In the dictionary to which learned Counsel referred, the meaning on which he relies is illustrated by the following sentence, "There has been no second Shakespeare". It seems plain to us that the meaning conveyed by the word 'second' in this sentence cannot be attributed to the word 'second' as used in the sub-section.

Then as regards the word 'offence' in the expression 'second offence' we find no justification for confining it to an offence constituted by the same type or kind of conduct as the previous offence. The sub-section does not say "second offence" of the same type; the latter words are not there. The object of the sub-section clearly is to prevent repetition of offences. That is why for the offence subsequently committed a heavier sentence is provided. We cannot imagine what object would have been served by seeking to stop the repetition of the same type of conduct only. The Act no doubt intends to prevent the doing of various acts by punishing them. That object is better served by imposing a heavier penalty when a person repeats any of such offensive acts. The gravamen of the charge of a second offence is the repetition of any offence under the Act and not the repetition of one of the various types of offences mentioned in it. Any interpretation which would not carry out the object of the Act would be unnatural. We, therefore, think that the words 'second offence' mean any offence under the Act committed by a person after his conviction earlier for any one of the offences punishable under the Act.

It was said that it would be strange if the Act intended to impose a heavier punishment for a second offence which might be of a trivial nature while the first offence which might have been of a serious nature entailed a lighter punishment. This contention is fallacious. There is no foundation in the Act for distinguishing between trivial and serious offences, for the Act provides the same punishment for each offence under it. If the punishment is the same, it would follow that the statute considered them to be of the same seriousness. The weakness of this argument will further appear if we consider a case where the first offence was of what is called a trivial nature and the second, of a serious nature though constituted by different acts. It would be equally strange if the Act in such a case contemplated the same punishment for the subsequent and serious offence as would be the case if the subsequent offence was not a 'second offence'. This contention lends no support to the interpretation suggested by learned Counsel for the appellant.

Learned Counsel then said that the word 'offence' has to be understood as defined in section 2 (38) of the General Clauses Act, 1897, and therefore means any act or omission made punishable by any law for the time being in force. If we substitute this definition for the word 'offence' in the provision now under consideration, it will mean an act made punishable by the law. That law must be the present Act. This does not assist learned Counsel's contention at all; it really goes against him.

The word 'offence' no doubt, refers to an offence under the Act. It cannot possibly mean any offence under any other Act. This view has invariably been taken in all the cases which have been cited to us; see *City Board, Saharanpur v. Abdul Wahid*¹, and *Chuttan v. State*². In *re Authers*³, it was said:

"Where the Legislature passes a statute and imposes a penalty of 50 l for a first offence, it must mean, in the absence of express words to the contrary, that the conviction for the first offence must be under that Act, and the second conviction under the same Act; if it were otherwise, it would be idle to introduce the warning of a lower penalty for the first offence, and to impose a higher penalty for the second".

This case supports our interpretation of the words 'second offence' based on the object of the Act.

Learned Counsel for the appellant no doubt agrees that the second offence must refer to an offence under the Act but he says that since it would amount to adding the words 'under the Act', it would justify the addition of further words

1. A I.R. 1959 All. 695.
2. A.I.R. 1960 All. 629.

3. (1889) L R. 22 Q.B.D. 345, 349.

implying that the second offence had to be of the same type as the first. This is a wholly unfounded contention. The offence contemplated in the expression 'second offence' has to be under the Act because that arises from the object of the Act and, as we shall later show, from the necessary implication of the structure of the sub-section. There is no such reason to confine the second offence to an offence of the same type.

We have so far been dealing only with that portion of sub-section (1) of section 16 which concerns the penalty for the second offence. Considering the sub-section as a whole we find that it supports the interpretation of the expression 'second offence' which has appealed to us. It says that if any person does any of the acts mentioned in clauses (a) to (g) in it, he shall be punishable for the first offence with a certain penalty, for the second offence with a higher penalty and for the third a still higher penalty. It is clear that the acts or omissions mentioned in the different clauses constitute offences for which the penalties are provided. From this structure of the sub-section the implication necessarily arises that the penalties were imposed for offences under the Act only. Now clause (a) deals with a person importing, manufacturing for sale, storing, selling or distributing any article of food in contravention of the provisions of the Act or of any rule made thereunder. This clause contemplates the breaches of various provisions of the Act and the Rules, which are numerous. It covers various types of conduct, act or omission, each of which is punishable and each of which is, therefore, an offence. Turning next to that part of the sub-section which prescribes penalties, we find it provides increasing degrees of punishment for the second offence and the third and subsequent offences. It follows that an offence contemplated in this part of the statute—and with it we are now directly concerned—would be constituted by any of the acts which would come within clause (a) and likewise within all the other clauses following it. We have pointed out that the acts and omissions contemplated there are of diverse kinds. The words "second offence" must, therefore, mean any act which is an offence under any of the clauses in the sub-section which has been done later in point of time after a conviction for an offence under the Act, no matter whether the acts or omissions constituting the two offences are of the same type or not. The appellant must, therefore, be held to have committed the second offence within the meaning of the sub-section on the present occasion and was liable to have the heavier punishment awarded to him. The sentence awarding such punishment is unexceptionable.

The appeal fails and it is hereby dismissed.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, K. SUBBA RAO, M. HIDAYATULLAH AND J. R. MUDHOLKAR, JJ.

Mahadev Sharma and others

.. *Appellants**

v.

The State of Bihar (In both the Appeals)

.. *Respondent.*

Penal Code (XLV of 1860), sections 302 read with 149—Conviction for offences under—Charges under sections 147 and 148—If essential.

Charges under sections 147 and 148 of the Penal Code are not necessary before conviction under section 302 could be made with the aid of section 149 of the Code. It may be useful to add a charge under section 147 and section 148 with charges under other sections of the Penal Code read with section 149, but it is not obligatory to do so. The ingredient of section 143 are implied in section 147 and the ingredients of 147 are implied when a charge under section 149 is included. There can be proof under section 149 of the existence of an unlawful assembly, of the common object and of the part played by the unlawful assembly or any of its members, same as under section 143 or section 147 or section 148.

*Crl.A.Nos. 209 of 1962 and 3 of 1963.

21st April, 1965.

There may be additional changes under these sections to guard against failure of the charge for an offence read with section 149 but the other charges cannot be regarded as conditions precedent.

Appeals by Special Leave from the Judgment and Order dated 30th August, 1962, of the Patna High Court in Government Appeal No. 33 of 1959 and Criminal Appeal No. 392 of 1959 respectively.

S. P. Varma, Advocate, for Appellants (In Cr.A.No. 209 of 1962).

K. K. Sinha, Advocate, for Appellants (In Cr.A. No. 3 of 1963).

U. P. Singh, Advocate, for Respondent (In both the Appeals).

The Judgment of the Court was delivered by

Hidayatullah, J.—In these two appeals by nine persons, who have been convicted under section 302/149, Indian Penal Code, Special Leave is limited to one question of law, namely, whether the accused could be legally convicted under the above sections when they were not charged and convicted under section 147 or section 148 of the Indian Penal Code? It appears from the judgment under appeal that there was a difference of opinion on this point in the High Court at Patna and the appeals in the High Court were disposed of by a Full Bench which held that charges under sections 147 and 148 were not necessary before conviction under section 302, Indian Penal Code, could be made with the aid of section 149, Indian Penal Code.

In view of the limited nature of the appeals only the essential facts may be stated. The person who lost his life was one Misari who was related to some of the accused persons. In the past there were other incidents. In 1955 one Ajab Lal was murdered and some of the present accused were prosecuted but were acquitted. Subsequently, one Baldeo Sharma was murdered and some of the prosecution witnesses in this case were charged with that offence. At the time of the judgment under appeal (30th August, 1962) an appeal was pending in the Patna High Court against the conviction of the accused in that case.

The present occurrence took place on 24th April, 1958. The prosecution case is that Misari was going in the morning to call labourers when he was attacked by the appellants with diverse weapons. He died as a result of his injuries and a case was registered under section 302, Indian Penal Code. The appellants were charged at the trial alternatively under section 302/149 and 302/34, Indian Penal Code. The Additional Sessions Judge, Monghyr, convicted three of the appellants on both the charges, sentencing them to imprisonment for life on the first charge only. The remaining accused were acquitted. Appeals by those who were convicted and by the State Government against the acquittal of the others were heard together and were disposed of by the common judgment now under appeal. The appeal of the State Government was allowed and that of the three convicted accused was dismissed. As a result all the original accused were convicted under section 302/149, Indian Penal Code, and were sentenced to imprisonment for life. During the hearing of the appeals a point was raised by the State Counsel in the appeal by the State that the trial was bad inasmuch as no charge under section 147 or section 148 had been framed. The Divisional Bench thinking that the point might benefit the convicted accused allowed it to be raised but referred the appeals to a Full Bench in view of an earlier decision on this point with which they did not agree. The Full Bench overruled the earlier decisions and came to the conclusion that it was not obligatory for the validity of the conviction under section 302/149, Indian Penal Code, that a charge under section 147 or section 148 should have been framed and a conviction under those sections recorded.

The charges against the appellants were as follows :—

“First.—That, you on or about the 24th April, 1958 at 7 A.M. at village Jhanjhra P S Parbatta, district Monghyr, were members of unlawful assembly, armed with gun, *bhala* and *chhura* (dagger) and in prosecution of the common object to murder Misari Sharma you all caused such bodily injury to Misari Sharma, which caused his death, the offence punishable under section 302, Indian Penal Code, and thereby committed an offence punishable under section 149/302 of the Indian Penal Code and within the cognizance of Court of Sessions.”

"That you, on or about the 24th April, 1958 at 7 A.M. at village Jhanjhra, P.S. Parbatta, district Monghyr, in furtherance of the common intention of you all caused the death of Misari Sharma, intentionally and knowingly, and thereby committed an offence punishable under section 302/34 of the Indian Penal Code, and within my cognizance and I hereby direct that you be tried by the said Court on the said charge."

No charge under section 147 or section 148 was framed and the question is whether the conviction under section 302/149, Indian Penal Code, could legally be recorded in the absence of such a charge or charges. Mr. S. P. Verma has brought to our notice the earlier unreported decisions of the Patna High Court which were considered and overruled by the Full Bench and has contended that they were correct and the judgment under appeal is erroneous.

Section 149 occurs in Chapter VIII of the Indian Penal Code which deals with offences against the public tranquillity. That Chapter consists of twenty-one sections and most of them are concerned with assemblies which are a danger to public peace. Such assemblies are designated unlawful assemblies and the punishment for membership varies in severity according as the assembly only menaces the public peace or actually disturbs it. The scheme of the Chapter may now be examined.

Section 141 defines an unlawful assembly as an assembly of five or more persons the common object of which is *inter alia* to commit an offence. There are five clauses which describe the many kinds of common objects which render an assembly unlawful. These clauses need not be reproduced here for nothing turns on them in the present case. Here we are concerned with the offence of murder and according to the charge the common object of the accused who had formed themselves into an assembly was to commit the murder of Misari. This common object has been held proved and there can thus be no question that this was an unlawful assembly. Continuing again with the scheme of the Chapter, we next see that section 142 says that a person is considered to be a member of an unlawful assembly, if, being aware of facts which render any assembly an unlawful assembly he intentionally joins that assembly or continues in it. A mere membership of an unlawful assembly is punishable under section 143. Under the next section heavier punishment is awardable to a person who joins an unlawful assembly armed with a deadly weapon or with anything which used as a weapon of offence is likely to cause death. Section 145 next provides for a similar higher punishment for a person who joins or continues in an unlawful assembly knowing that it has been ordered to disperse. These sections make membership as such of an unlawful assembly punishable, though in varying degrees.

Section 146 then defines the offence of rioting. This offence is said to be committed when the unlawful assembly or any member thereof in prosecution of the common object of such assembly uses force or violence. It may be noticed here that every member of the unlawful assembly is guilty of the offence of rioting even though he may not have himself used force or violence. There is thus vicarious responsibility when force or violence is used in prosecution of the common object of the unlawful assembly. The next two sections prescribe punishment for the offence of rioting. Section 147 punishes simple rioting. Section 148 punishes more severely a person who commits the offence of rioting armed with a deadly weapon but the section makes only a person who is so armed liable to higher punishment. Section 149 then creates vicarious responsibility for other offences besides rioting. The section provides as follows :—

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.— If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

For the application of the section there must be an unlawful assembly. Then if an offence is committed in prosecution of the common object of that assembly or is such as the members of the unlawful assembly know to be likely to be committed

then whoever is member of that assembly at the time the offence is committed is guilty. The remaining sections do not help in the present discussion.

This being the scheme, is it obligatory to charge a person under section 147 or section 148 before section 149 can be utilized? Section 149 does not state this to be a condition precedent for its own application. No other section prescribes this procedure. Sections 146 and 149 represent conditions under which vicarious liability arises for the acts of others. If force or violence is used by a member in the prosecution of the common object of the unlawful assembly every member of the assembly, is rendered guilty of the offence of rioting and is punishable for that offence under section 147. The offence of rioting must, of course, occur when members are charged with murder as the common object of the unlawful assembly. Section 148 creates liability on persons armed with deadly weapons and it is a distinct offence. It need not detain us. If a person is not charged under section 147 it does not mean that section 149 cannot be used. When an offence (such as murder) is committed in prosecution of the common object of the unlawful assembly or the offence is one which the members of the assembly knew to be likely to be committed in prosecution of the common object, individual responsibility is replaced by vicarious responsibility and every person who is a member of the unlawful assembly at the time of the committing of the offence becomes guilty. It is not obligatory to charge a person under section 143, or section 144 when charging him with section 147 or section 148. Similarly, it is not obligatory to charge a person under section 143 or section 147 when charging him for an offence with the aid of section 149. These sections are implied. It may be useful to add a charge under section 147 and section 148 with charges under other offences of the Penal Code read with section 149, but it is not obligatory to do so. A person may join an unlawful assembly and be guilty under section 143 or 147 or 148 but he may cease to be its member at the time when the offence under section 302 or some other offence is committed. He would not in that event be liable for the other offence for section 149 would not apply to him. The present case is not of that kind.

The fallacy in the cases which hold that a charge under section 147 is compulsory arises because they overlook that the ingredients of section 143 are implied in section 147 and the ingredients of section 147 are implied when a charge under section 149 is included. An examination of section 141 shows that the common object which renders an assembly unlawful may involve the use of criminal force or show of criminal force, the commission of mischief or criminal trespass or other offence, or resistance to the execution of any law or of any legal process. Offences under sections 143 and 147 must always be present when the charge is laid for an offence like murder with the aid of section 149, but the other two charges need not be framed separately unless it is sought to secure a conviction under them. It is thus that section 143 is not used when the charge is under section 147 or section 148, and section 147 is not used when the charge is under section 148. Section 147 may be dispensed with when the charge is under section 149 read with an offence under the Indian Penal Code.

The charges that are framed against the appellants and which we have reproduced earlier, contain all the necessary ingredients to bring home to each member of the unlawful assembly the offence of murder with the aid of section 149. The prosecution has proved the existence of an unlawful assembly, its common object which was murder of Misari and the membership of each of the appellants. Nothing more was necessary. Of course, if a charge had been framed under section 147 or section 148 and that charge had failed against any of the accused then section 149 could not have been used against him. The area which is common to sections 147 and 149 is the substratum on which different degrees of liability are built and there cannot be a conviction with the aid of section 149 when there is no evidence of such substratum. It is quite a different thing to say that to lay down this substratum one must frame first a charge under section 143, then a charge under section 147 and then a charge under section 149. The last named section is not dependent on the others because the others are implied in circumstances in which section 149

is used. There can be proof under section 149 of the existence of an unlawful assembly, of the common object and of the part played by the unlawful assembly or any of its members, same as under section 143 or section 147 or section 148. There may be additional charges under these sections to guard against failure of the charge for an offence read with section 149 but the other charges cannot be regarded as condition precedent.

We agree with the conclusion of the Full Bench and therefore confirm the judgment under appeal. The appeals will be dismissed.

K.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

Mohammed Mahmood and another

.. *Appellants**

v.

Tikam Das and another

.. *Respondents.*

Madhya Pradesh Accommodation Control Act (XLI of 1961), sections 45 (1) and 15 (3)—Question whether sub-letting was lawful and sub-tenant was after termination of main tenancy entitled to be treated as direct tenant—Competency of Civil Court to decide.

On June 25 and 26, 1962, (after the landlord and tenant had by consent obtained a decree for ejectment) the appellants who were occupying the premises as sub-tenants under the tenant served notices on the landlord under section 15 (2) of the Madhya Pradesh Accommodation Control Act (1961) which had come into force on 30th December, 1961, claiming that as the tenant had sub-let the premises to them before the Act came into force with consent of the landlord, they had become his direct tenants under section 16 (2) of the Act, and on 28th June, 1962, filed a suit against both the landlord and tenant in a civil Court claiming a declaration that they had in the circumstances become direct tenants of the premises under the landlord. The landlord sent on 30th June 1962, a reply to the notices sent by the appellants in which he denied that the sub-letting by the tenant had been with his consent or was lawful. On a question whether in view of section 45 (1) a civil Court was competent to entertain the appellants' suit,

Held : The Rent Controlling Authorities had the power to decide whether the sub-letting was lawful and no Civil Court was competent to entertain it.

In spite of the consent decree for ejectment the appellants had any right under the Act to a direct tenancy under the landlord, they had a right to move the Rent Controlling Authority within the period mentioned for a decision of the question that the sub-letting to them was lawful. The failure of the landlord to apply under section 15 (3) would not affect the question.

Such a suit cannot be said to be one relating to title to the tenanted premises which the civil Court will be competent to entertain under section 45 (2) of the Act. "Title to any accommodation" in section 45 (2) refer to any right or interest in the property existing otherwise than under the Act, section 45 (2) does not make it competent for the civil Court to decide the dispute as to the lawfulness of the sub-letting.

Appeal by Special Leave from the Judgment and Decree dated 27th October, 1964, of the Madhya Pradesh High Court in Second Appeal No. 240 of 1964.

B. Sen, Senior Advocate (*M. S. Gupta*, Advocate, with him), for Appellants.

S. T. Desai, Senior Advocate (*A. G. Ratnaparkhi*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Sarkar, J.—The first respondent Tikam Das had let out a house in the city of Jabalpur to the second respondent Surya Kant Naidoo. Sometime in 1961 Tikam Das, herein referred to as the landlord, served a notice on Surya Kant, herein referred to as the tenant, terminating the tenancy and later in the same year filed

a suit in a civil Court against the latter for ejectment. On 23rd June, 1962, by consent of parties, a decree for ejectment was passed in that suit in favour of the landlord against the tenant. The appellants who were occupying the premises as sub-tenants under the tenant had not been made parties to the suit.

On 25th and 26th June, 1962, the appellants served notices on the landlord under section 15 (2) of the Madhya Pradesh Accommodation Control Act, 1961 which had come into force on 30th December, 1961, claiming that as the tenant had sub-let the premises to them before the Act had come into force with the consent of the landlord, they had become his direct tenants under section 16 (2) of the Act and on 28th June, 1962, the appellants filed a suit against both the landlord and the tenant in a civil Court claiming a declaration that they had in the circumstances become direct tenants of the premises under the landlord. On 30th June, 1962, the landlord sent a reply to the notices sent by the appellants in which he denied that the sub-letting by the tenant had been with his consent or was lawful. It does not appear that the landlord had put his decree in execution for evicting the appellants.

One of the points canvassed in the High Court was whether in view of section 45 (1) of the Act a civil Court was competent to entertain the appellant's suit and it held that it was not and in that view of the matter dismissed the suit. The question is whether the High Court was right.

The Act established certain authorities called Rent Controlling Authorities and gave them power to decide various matters. Sub-section (1) of section 45 states, that

"no civil Court shall entertain any suit or proceeding in so far as it relates.....to any..... matter which the Rent Controlling Authority is empowered by or under this Act to decide"

If, therefore, the suit related to a matter which a Rent Controlling Authority had jurisdiction to decide, the civil Court would have no jurisdiction to entertain it.

Now the appellants' suit was for a declaration that they had become direct tenants under the landlord by virtue of section 16 (2) of the Act. That provision is in these terms :

"Section 16 —(1) * * * * *

(2) Where before the commencement of this Act, the interest of a tenant in respect of any accommodation has been determined without determining the interest of any sub-tenant to whom the accommodation either in whole or in part had been lawfully sub-let, the sub-tenant shall, with effect from the date of the commencement of this Act be deemed to have become a tenant holding directly under the land-lord on the same terms and conditions on which the tenant would have held from the landlord, if the tenancy had continued "

Clearly the appellants would not be entitled to the benefit of this provision unless the sub-letting to them was lawful. This is where their difficulty arises. Sub-section (2) of section 15 deals with the case of a sub-letting before the Act and provides for a notice of the sub-letting being given to the landlord by the tenant and the sub-tenant. There is no dispute that the sub-letting to the appellants was before the Act and they had given the notice. The sub-letting, therefore, comes within sub-section (2) of section 15. Then we come to sub-section (3) of section 15 which provides,

"Where in any case mentioned in sub-section (2), the landlord contests that the accommodation was not lawfully sub-let and an application is made to the Rent Controlling Authority in this behalf either by the landlord or by the sub-tenant within two months of the date of the receipt of the notice of sub-letting by the landlord or the issue of the notice by the tenant or the sub-tenant, as the case may be, the Rent Controlling Authority shall decide the dispute."

This sub-section empowers a Rent Controlling Authority to decide whether a sub-letting was lawful where the landlord disputes that the sub-letting was lawful, on an application made to it by either party within the period mentioned. When the Rent Controlling Authorities have the power to decide the lawfulness of the sub-letting, a civil Court is plainly debarred from deciding that question by section 45 (1). In the present case the landlord did contend that the sub-letting was not lawful. The appellants' suit was filed within the period mentioned in sub-section (3)

of section 15. So the Rent Controlling Authorities had the power to decide the question on which the appellants' suit depended. It follows that the suit related to a matter which the Rent Controlling Authorities had power to decide and no civil Court was, therefore, competent to entertain it. Hence we think that the High Court was right in deciding that the suit had been filed in a Court incompetent to entertain it, and in dismissing it.

It was said that a Rent Controlling Authority would have no power to decide a dispute as to whether a sub-letting was lawful where the notice mentioned in section 15 (2) had not been served, or after the period mentioned in sub-section (3) of that section had expired if it had not been moved earlier. Another question mooted was that the two months mentioned in sub-section (3) only provided a special period of limitation for the application mentioned in it and the provision of the period did not mean that a Rent Controlling Authority had power to decide the matter only if an application had been made within that period, so that if no such application had been made, after the expiry of the period a civil Court would have jurisdiction to decide a dispute as to whether a sub-letting was lawful. The point is that the real effect of section 15 (3) was to deprive the civil Court of the jurisdiction to decide that dispute for all time. We do not feel called upon to decide these questions. They do not arise in the present case and it was not said that these questions affect the question of the competence of the civil Court to try the present suit. They clearly do not. The suit was filed within the period of two months during which admittedly the Rent Controlling Authorities had jurisdiction to decide the dispute on which it was based. Whatever may be the jurisdiction of a civil Court on other facts, in the present case it clearly had no jurisdiction to entertain the appellants' suit.

It was said on behalf of the appellants that section 15 (3) had no application to the present case as the landlord had before the appellants' suit was filed, obtained a decree against the tenant for eviction. We are unable to accept this contention. There is nothing in sub-section (3) of section 15 to indicate that it does not apply to a case where a landlord has obtained such a decree. If in spite of the decree the appellants had a right under the Act to a direct tenancy under the landlord, they had a right to move the Rent Controlling Authority within the period mentioned (now expired) for a decision of the question that the sub-letting to them was lawful. If the Rent Controlling Authority had the power to decide that question, a civil Court would not be competent to decide the dispute in a suit brought within that period. So the decree does not make a civil Court, a Court competent to entertain the suit.

It was also said that as the landlord had not applied under sub-section (3) of section 15 and this is not disputed by the landlord—that provision is put out of the way and it must now be held that the appellants had become direct tenants under him. The words of the sub-section lend no support to this contention. The appellants can claim the direct tenancy only when they establish that the sub-letting to them was lawful. As they claim that right, they must establish it and they do not do so by the failure of the landlord to move for a decision that the sub-letting was not lawful. This contention of the appellants seems to us to be untenable. In any case it is difficult to appreciate how the failure of the landlord to apply under section 15 (3) would affect the question of the competence of a civil Court to entertain the appellants' suit which had been filed before the time limited by the sub-section for the landlord to apply to a Rent Controlling Authority had expired.

We now come to sub-section (2) of section 45 of the Act which is in these terms :

"Section 45.—(1) * * * * *

(2) Nothing in sub-section (1) shall be construed as preventing a civil Court from entertaining any suit or proceeding for the decision of any question of title to any accommodation to which this Act applies or any question as to the person or persons who are entitled to receive the rent of such accommodation."

It is said by the appellants that their suit raises a question of title to the tenanted premises within the meaning of that word as used in the sub-section. This con-

tention does not seem to us to be well founded. "Accommodation" has been defined in the Act as a building, garden, ground, out-house, or garage appurtenant to it, its fixtures and furniture supplied for use there and also land not used for agricultural purpose. The word, therefore, refers to property of certain varieties and in our opinion the words "title to any accommodation" in the sub-section mean a right to or interest in property existing otherwise than under the Act and not those created by it. It does not include a sub-tenant's right created by the Act to be treated under certain circumstances as the direct tenant of the landlord. This seems to us to be clear from the whole scheme of the Act, which is to create certain rights and to leave them in certain cases to be decided by the Rent Controlling Authorities established under it, quickly, inexpensively and summarily and with restricted rights of appeal from their decision. The object of the Act as disclosed by its scheme would be defeated if civil Courts were to adjudicate upon the rights, which it was intended the Rent Controlling Authorities would decide, with all the consequent delay, expense and series of appeals. Again if the civil Courts had the power to decide such rights, section 15 (3) would be meaningless, for the decision of the dispute as to whether sub-letting was lawful was necessary only for establishing a sub-tenant's right to a direct tenancy under the landlord under section 16 (2). Sub-section (2) of section 45 was clearly intended only to protect a right to resort to a civil Court for the decision of a question as to an interest in property existing apart from the Act concerning which an adjudication may have been incidentally made by a Rent Controlling Authority in deciding a question which it had been expressly empowered by the Act to decide. We, therefore, think that sub-section (2) of section 45 does not authorise a civil Court to decide the dispute as to the lawfulness of the sub-letting and does not therefore make it competent to entertain the appellants' suit.

For these reasons, in our view, no civil Court had jurisdiction to try the appellants' suit and it was rightly dismissed as having been filed in an incompetent tribunal. The result is that the appeal fails and is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

Lekhraj Sathramdas Lalvani (In both the Appeals)

*Appellant**

v.

N. M. Shah, Deputy Custodian-cum-Managing Officer, Bombay
and others (In both the Appeals)

Respondents.

Administration of Evacuee Property Act (XXXI of 1950), section 10 (2) (b)—Power under of custodian to appoint manager of evacuee property—Include power to remove such manager—Removal by the Managing Officer-cum-Deputy Custodian of Evacuee Property after coming into force of Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954)—Validity—General Clauses Act (X of 1897), section 16—Applicability—Constitution of India (1950)—Writ of mandamus—When can be issued

The power of appointment of manager conferred upon the Custodian under section 10 (2) (b) of the Administration of Evacuee Property Act (1950) confers by implication upon the Custodian the power to suspend or dismiss any person appointed. Section 10 (2) (b) read with section 16 of the General Clauses Act confers such power. The power to terminate is a necessary adjunct of the power of appointment and is exercised as an incident to or consequence of that power. Though in the instant case the order of removal of the appellant as Manager was made (after the Displaced Persons (Compensation and Rehabilitation) Act (1954) had come into force by the Managing Officer-cum-Deputy Custodian of Evacuee Property, assuring that the "Managing Officer" under the 1954 Act is not the proper authority to cancel the appointment of a Manager, as section 10 (2) (b) of the 1950 Act had not been repealed the Deputy Custodian is the proper authority to cancel the appointment of a Manager and the order of removal in the instant case is legally valid though the authority also described himself

* C.As. Nos. 414 and 415 of 1963.

as "Managing Officer". When an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its power under any other rule and the validity of the impugned order should be judged on a consideration of its substance and not of its form.

In any event a writ of *mandamus* can be granted only in a case where there is a failure on the part of the officer to discharge a statutory duty imposed on him. In the instant case the appointment of the appellant is merely contractual in its nature and there is no statutory obligation as between the Custodian and the appellant. A mere contractual obligation cannot be enforced against a public servant by the machinery of a writ under Article 226 of the Constitution.

[On the facts it was held that there was no final allotment of the two businesses to the appellant and he has no legal right to those businesses.]

Appeals from the Judgment and Order dated 6th December, 1960, of the Kerala High Court in A.S. Nos. 445 and 484 of 1960.

R. Mahalingier and *N. N. Keswani*, Advocates, for Appellant (In both the Appeals).

Gopal Singh, Advocate, and *R. N. Sachthey*, Advocate, for *B. R. G. K. Achar*, Advocate, for Respondents (In both the Appeals).

The Judgment of the Court was delivered by

Ramaswami, J.—The proprietors of two firms styled "Adam Hajee Peer Mohd. Essack" and "Hajee Ebrahim Kassam Cochinwala" had, in the year 1947, migrated to Pakistan and both these firms became vested in the Custodian of Evacuee Properties for the State of Madras under section 8 of the Administration of Evacuee Property Act, 1950, hereinafter referred to as the 1950 Act. On 6th March, 1952, the appellant was appointed as Manager of the two firms under section 10 (2) (b) of the 1950 Act. The appellant also furnished security of Rs. 20,000 before taking possession of the business of the firms as Manager. The order of appointment—Exhibit P-1 dated 6th March, 1952, states :

"The Custodian approves the proposal of the Deputy Custodian. Malabar that the Management of both the firms of Adam Hajee Peer Muhammad Essack and Hajee Ebrahim Kassam Cochinwala at Kozhikode may be allotted to Sri L. S. Lalwani for the present on the same system as exists now between the Government and the present two managers and on his furnishing a security of Rs. 20,000 to the satisfaction of the Deputy Custodian. The question of outright allotment as contemplated in Custodian-General's letter No. 2811/CG/50 dated 20th March, 1950, will be taken up in due course."

On 9th October, 1954, the Displaced Persons (Compensation and Rehabilitation) Act, 1954 was passed which will hereafter be referred to as the 1954 Act. On 11th April, 1956, there was an advertisement published in the Press for the sale of the aforesaid evacuee properties. The appellant applied to the Chief Settlement Commissioner for stopping the sale of the two concerns. On 25th April, 1956 the Central Government made an order—Exhibit P-5—which states :

"I am directed to state that it has been decided in principle that the aforesaid evacuee concerns will be allotted to you. The terms of allotment will be communicated to you separately. Meanwhile, you will continue to function as the Custodian's Manager for these concerns in terms of section 10 (2) (b) of the Administration of Evacuee Property Act, read with Rule 34 of the Rules made under the Act."

On 21st June, 1956, another letter—Exhibit P-8—was written to the appellant by the Custodian of Evacuee Properties which states :

"The Deputy Custodian is informed that the Government of India have decided that the two evacuee concerns *viz.*, firms of Adam Hajee Peer Mohammed Essack and Hajee Ebrahim Kassam Cochinwala of Kozhikode are to be allotted to the Present Manager Shri L. S. Lalwani and ultimately sold to him. He is also informed that until the question of terms and conditions of allotment of the concerns in question is decided Shri Lalwani will continue to function as Custodian's Manager for these concerns in terms of section 10 (2) (b) of the Administration of Evacuee Property Act, 1950 read with rule 34 of the Rules made thereunder. The Deputy Custodian is requested to evaluate the business concerns properly after getting prepared a balance-sheet of each year of the vesting of the concerns, evaluating the concerns, the Deputy Custodian should keep in view the other assets and liabilities of the concerns and their good will, etc. His comment and suggestions as to how and by what easy instalments the value of the concerns if sold to Shri Lalwani is to be realised from him should also be intimated."

The bargain was not concluded and on 25th March, 1958, there was an advertisement in the Press about the public auction of the business of the firms. The appellant moved the High Court of Kerala for grant of a writ restraining the District Collector from selling the business of the firms by a public auction. The application was allowed and on 25th June, 1959 the Kerala High Court directed the District Collector not to sell the properties of the business of the two firms without an appropriate order of the Chief Settlement Commissioner. The decision of the High Court is based upon the ground that there was no order under the 1954 Act by the Chief Settlement Commissioner for sale of the properties and that in the absence of such an order the sale of the properties cannot take place. It appears, that the order of the Chief Settlement Commissioner was subsequently made on 15th September, 1959. In pursuance of that order the management of the appellant was terminated and the possession of the business was taken over by the Deputy Custodian—Respondent No. 1. The order—Exhibit P-13—dated 18th December, 1959, states :

“Shri L. S. Lalvani is informed that his services as Manager of the business concerns of Adam Hajee Per Mohd. Essack and Hajee Ebrahim Kassam Cochinwala, at Kozhikode, are hereby terminated with immediate effect. He is further required to hand over immediate possession of the premises and the stock-in-trade, account books and other assets of the business including furniture, etc.”

The appellant filed a writ petition in the High Court of Kerala—being O.P. No. 1438 of 1959 for grant of (1) a writ of *certiorari* for quashing the order dated 15th December, 1959—Exhibit P-13—and the proceedings dated 18th December, 1959—Exhibit P-16 (2) a writ of *mandamus* directing respondents Nos. 1 and 2 to hand over possession of the two business concerns including the premises, stock-in-trade, all records, etc. to the appellant, and (3) a writ of *mandamus* or appropriate writ or order directing respondents Nos. 1 to 3 not to sell by public auction or otherwise the two evacuee business concerns. S. Velu Pillai, J., by his order dated 8th June, 1960, granted writ to the appellant as prayed for in prayers (1) and (2) but refusal prayer (3) for a writ of *mandamus* restraining the respondents from selling the business by public auction. Against the order of the Single Judge the respondents filed an appeal being A.S. No. 484 of 1960 before the Division Bench of the High Court. The appellant also preferred an appeal A.S. No. 445 of 1960 against the order of Single Judge which was in regard to the refusal of the third relief. By judgment dated 6th December, 1960, the Division Bench of the High Court dismissed appeal A.S. No. 445 of 1960 filed by the appellant but allowed the appeal A.S. No. 484 of 1960 filed by the respondents. The present appeals are brought on behalf of the appellant by certificate of the Kerala High Court granted under Article 133 (1) (a) of the Constitution.

The first question arising in this case is whether the appellant was lawfully removed from the management of the business by the order of the respondent No. 1 dated 18th December, 1959—Exhibits P-13 and P-16. It was submitted on behalf of the appellant that under section 10 (2) (b) of the 1950 Act the Custodian had the power to appoint a Manager for the Evacuee Property for carrying on any business of the evacuee and there was no power conferred by the Act upon the Custodian to remove the Manager so appointed. It was argued by the Counsel on behalf of the appellant that an indefeasible right of management was conferred upon the appellant because of the order of the Custodian—Exhibit P-1 dated 6th March, 1952. In our opinion, there is no warrant for this argument. The power of appointment conferred upon the Custodian under section 10 (2) (b) of the 1950 Act confers, by implication, upon the Custodian the power to suspend or dismiss any person appointed. [Section 16 of the General Clauses Act states :

“Where, by any Central Act or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power.”

It is manifest that the management of the appellant with regard to the business concerns can lawfully be terminated by the Deputy Custodian by virtue of section 10 (2) (b) of the 1950 Act read with section 16 of the General Clauses Act.

The principle underlying the section is that the power to terminate is a necessary adjunct of the power of appointment and is exercised as an incident to or consequence of that power.

It was then contended on behalf of the appellant that the order of removal—Exhibits P-13 and P-16—was made by the Managing Officer-cum-Deputy Custodian of Evacuee Property of Southern States under the 1954 Act which conferred no power on such an officer to cancel the appointment of a Manager. It was pointed out that the order of removal was made after the provisions of the 1954 Act had come into force. In our opinion, there is no justification for this argument. We shall assume that the Managing Officer under the 1954 Act is not the proper authority to cancel the appointment of a Manager but it is not disputed that the provisions of the 1950 Act have not been repealed and still continue to be in force. Under section 10 (2) (b) of the 1950 Act the Deputy Custodian is the proper authority to cancel the appointment of a Manager and the order—Exhibits P-13 and P-16 dated 18th December, 1959 is, therefore, legally valid. It is true that the order—Exhibits P-13 and P-16 is signed by Mr. Mathur as “the Managing Officer-cum-Deputy Custodian of Evacuee Property” but the order of removal of the appellant from the management is valid because Mr. Mathur had the legal competence to make the order under the 1950 Act, though he has also described himself in that order as “Managing Officer”. It is well established that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its power under any other rule, and the validity of the impugned order should be judged on a consideration of its substance and not of its form. The principle is that we must ascribe the act of a public servant to an actual existing authority under which it would have validity rather than to one under which it would be void (See *Balakotaiah v. The Union of India*)¹. We, therefore, reject the argument of the appellant on this aspect of the case.

In our opinion, the order of the Deputy Custodian—Exhibits P-13 and P-16—removing the appellant from the management of the business is not vitiated by any illegality. But even on the assumption that the order of the Deputy Custodian terminating the management of the appellant is illegal, the appellant is not entitled to move the High Court for grant of a writ in the nature of *mandamus* under Article 226 of the Constitution. The reason is that a writ of *mandamus* may be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdictions. In the present case, the appointment of the appellant as a Manager by the Custodian by virtue of his power under section 10 (2) (b) of the 1950 Act is contractual in its nature and there is no statutory obligation as between him and the appellant. In our opinion, any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 226 of the Constitution. In *Commissioner of Income-tax, Bombay Presidency and Aden v. Bombay Trust Corporation, Ltd.*², an application was made under section 45 for an order directing the Commissioner to set aside an assessment to income-tax and to repay the tax paid by the applicant; the Bombay High Court made the order asked for but the decision of the Bombay High Court was set aside by the Judicial Committee. At page 427 of the report it is observed by the Judicial Committee :

“Before *mandamus* can issue to a public servant it must therefore be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown, his principal.”

A similar view has been expressed by the Calcutta High Court in *P. K. Banerjee v. L. J. Simonds*³. In our opinion, these cases lay down the correct law on the point.

1. (1958) S.C.J. 451 : (1958) 1 M.L.J. (S.C.) 162 : (1958) 1 An.W.R. (S.C.) 162 : (1958) S.C.R. 1052 at p. 1059 : A.I.R. 1958 S.C. 232.

2. (1936) L.R. 63 I.A. 408

3. A.I.R. 1947 Cal. 307.

We pass on to consider the next question presented on behalf of the appellant *viz.*, whether there was a final allotment of the business in favour of the appellant by the Chief Settlement Commissioner. It was contended for the appellant that in view of Exhibit P-5 dated 25th April, 1956 there was final allotment of the business, though the terms of allotment had to be subsequently determined. In Exhibit P-5 the Government of India state that "It has been decided in principle that the aforesaid evacuee concerns should be allotted to you" and the "terms of allotment would be communicated to you separately". Reference was made to Exhibit P-8 dated 21st June, 1956, wherein it is stated that the Government of India have decided that "the two evacuee concerns *viz.*, firms of Adam Hajee Peer Mohammed Essack and Hajee Ebrahim Kassam Cochinwala of Kozhikode are to be allotted to the present Manager Shri L. S. Lalvani and ultimately sold to him". It is also mentioned in the letter that :

"Until the question of terms and conditions of allotment of the concerns is decided Sri Lalvani will continue to function as Custodian's Manager for these concerns in terms of section 10 (2) (b) of the Administration of Evacuee Property Act, 1950 read with rule 34 of the Rules made thereunder."

It was submitted on behalf of the appellant that in view of these two letters it must be held that there was a final allotment of the business in favour of the appellant. We do not, however, think there is any justification for this argument. It is manifest that the terms and conditions of allotment were not finally settled between the parties and there was no concluded contract of sale and, therefore, the appellant had no legal right to the business of the two concerns and the High Court was right in holding that the appellant was not entitled to the grant of a writ in the nature of *mandamus* with regard to the possession of the two business concerns.

In our opinion, there is no merit in these appeals which are accordingly dismissed with costs.

K.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, K. N. WANCHOO AND S. M. SIKRI, JJ.

State of West Bengal and others

.. *Appellants **

v.

P. N. Talukdar and others

.. *Respondents.*

Land Acquisition Act (I of 1894), sections 6, 40 and 41—Acquisition of land for Ramakrishna Mission—Notification under section 6 stating that land was needed for public purpose namely, for construction of staff-quarters, hostel building and playground of Ramakrishna Mission at the public expense of Ramakrishna Mission—Construction of—Acquisition if for public purpose or for company—Government giving consent for such acquisition under clause (b) of section 40 (1) only—Validity of acquisition proceedings.

The Ramakrishna Mission, a society registered under the Societies Registration Act (XXI of 1860) and established for the purpose of imparting and promoting the study of Vedanta and its principles as propounded by Sri Ramakrishna and of comparative theology in its widest form and also to propagate religious, social and educational teachings and activities for the benefit of the public, applied for acquisition of certain lands for the construction of buildings for the purpose of carrying out its objects. The State Government after fulfilling the formalities issued a notification under section 6 of the Land Acquisition Act (I of 1894) in the following terms : "Whereas the Governor is satisfied that land is needed for a public purpose namely for the construction of staff-quarters, hostel building and playground of Ramakrishna Mission at it is hereby declared that a piece of land comprising is needed for the aforesaid public purpose at the public expense of Ramakrishna Mission" On the question whether the acquisition was for a company or for a public purpose and whether the acquisition proceedings were valid,

Held, (i) the notification was clumsily drafted inasmuch as it did not say in so many words that the acquisition was for a company and the words at the "public expense of the Ramakrishna Mission" were a contradiction in terms. But on a fair and reasonable reading of the notification there could be no doubt that it only meant that the land was required for a company (namely the Ramakrishna Mission) and that it was to be acquired at the expense of the company (namely the Ramakrishna Mission). Therefore the contention that the notification was bad inasmuch as it said that land was needed for a public purpose and there was no provision for payment of compensation in part or in whole from the public revenues, must fail;

(ii) the presumption contained in section 6 (3) of the Land Acquisition Act does not mean that the Court is precluded from enquiring whether the notification that the land was needed for a public purpose was made in fraud of the Land Acquisition Act, namely, against the proviso to section 6 (1) which requires that such a notification cannot be made unless part or whole of the compensation comes out of public revenues or some fund managed or controlled by a local authority;

(iii) while giving consent under section 40 (1) of the Land Acquisition Act, which is a condition precedent for the validity of acquisition proceedings for a company, generally speaking the appropriate Government would not state in so many words whether it was proceeding under clause (a) or clause (aa) or clause (b) of that section. The question whether consent has been given under one clause or the other or more than one clause has to be decided on the basis of the agreement entered into by the company under section 41 and the notification under section 6. It is open to the appropriate Government to give consent on being satisfied as to one of the three clauses only or as to more than one clause.

In the instant case though the construction of playground and hostel building might fall within clause (b) of section 40 (1) the construction of staff-quarters could not fall within that clause. Hostel building and playground were obviously meant for the students of the institution of the Ramakrishna Mission and such students as a body are a section of the public and therefore the hostel and the playground can be directly useful to this section of the public; but so far as staff-quarters were concerned they were meant for occupation of individual members of the staff. It cannot be argued that an individual member of the staff must also be held to be a section of the public. Construction of staff-quarters could not therefore be brought within the ambit of clause (b) of section 40 (1). There was nothing to show that the State Government had applied its mind to clause (a) or clause (aa) of section 40 (1) when giving consent to the acquisition. The State Government gave consent to the acquisition only under clause (b) and as construction of staff-quarters did not come within that clause and as there was nothing to indicate what part of the land to be acquired was meant for staff-quarters and what part for hostel building and playground the entire acquisition proceedings were bad and must be struck down.

Appeals from the Judgment and Order dated 12th June, 1963, of the Calcutta High Court in Appeals from Original Orders Nos. 50 and 51 of 1963.

C. K. Daphtry, Attorney-General for India and *B. Sen*, Senior Advocate (*P. K. Bose*, Advocate, with them) for Appellants (In Appeals Nos. 410 and 411 of 1964), Respondents Nos. 2 to 6 (In Appeal No. 412 of 1964) and Respondents Nos. 30 to 34 (In Appeal No. 413 of 1964).

G. S. Pathak, Senior Advocate (*Durgabai Deshmukh*, *S. N. Mukherjee*, *S. C. Bose*, *A. K. Basu* and *Naunit Lal*, Advocates, with him), for Appellants (In Appeals Nos. 412 and 413 of 1964), Respondent No. 2 (In Appeal No. 410 of 1964) and Respondent No. 29 (In Appeal No. 411 of 1964).

S. V. Gupte, Additional Solicitor-General of India (*I. N. Shroff*, Advocate, with him), for Respondent No. 1 (In Appeals Nos. 410 and 412 of 1964) and Respondent No. 29 (In Appeal No. 413 of 1964).

I. N. Shroff and *A. G. Ratnaparkhi*, Advocates, for Respondents Nos. 2 to 28 (In Appeals Nos. 410 and 412) and Respondents Nos. 1 to 28 (In Appeal No. 413 of 1964).

The Judgment of the Court was delivered by

Wanchoo, J.—These four appeals on certificates granted by the High Court of Calcutta arise out of the same land acquisition proceedings and raise the same points and will be dealt with together. There were two petitions before the High Court under Article 226 of the Constitution challenging the land acquisition proceed-

ings which were dealt with together. The learned Single Judge who originally dealt with the matters dismissed the petitions. Then followed two appeals to the Division Bench of the High Court which were allowed. Four applications were then made for certificates to appeal to this Court, two of them by the State of West Bengal and two by the Ramakrishna Mission (hereinafter referred to as the Mission) in whose favour the acquisition proceedings were taken. That is why we have four appeals before us, two by the State of West Bengal and two by the Mission. We propose to deal with them together in this judgment.

The Mission is a society registered under the Societies Registration Act of 1860 and the object of the society, *inter alia*, is to impart and promote the study of Vedanta and its principles as propounded by Sri Ramakrishna and of comparative theology in its widest form and also to propagate religious, social and educational teachings and activities for the benefit of the public. In that connection the Mission had acquired by private purchase or acquisition under the Land Acquisition Act I of 1894 (hereinafter referred to as the Act) a large tract of land at a place called Narendrapur. In order to carry out its objects, the Mission, *inter alia* establishes, maintains and carries on schools, colleges, orphanages, workshops, laboratories, hospitals, dispensaries, houses for the infirm, the invalid and the afflicted, famine relief works and other educational and charitable works and institutions of a like nature. For that purpose it constructs, maintains or alters any houses, buildings or works necessary or convenient therefor. In the recent past the Mission had started various public works in the locality known as Narendrapur and established there (a) a residential degree college with hostel building and staff-quarters, (b) a residential multi-purpose school, (c) a residential senior basic school and an institution for the blind with similar amenities, (d) a students' home for the residence of students who study in the University or other colleges, and an institution for the promotion of adult and social education with hostels, etc., (e) a school of shorthand and typewriting, (f) a dairy farm, (g) a poultry farm and fishery for training purposes, (h) a centre for training carpentry and book binding, etc., (i) a fully equipped hospital, (j) a library, a gymnasium, workshops for the boys of schools and colleges, agricultural farms for the multi-purpose school.

In October, 1960, the Mission applied to the Land Acquisition Collector, Alipore, for acquisition of certain lands as the land at its disposal at Narendrapur was not sufficient for its purpose. The Land Acquisition Collector was requested to start proceedings beginning with section 4 read with section 38 of the Act for the acquisition of 14.11 acres of land and most of this land was in the shape of pockets in the existing land of the Mission or adjacent to it. The Mission informed the Collector that it was willing and ready to enter into necessary agreement with the Government as provided for in the Act for purposes of this acquisition and pay also all reasonable costs in respect thereof. Thereafter a notification was issued under section 4 of the Act on 24th July, 1961, in which it was recited that the land was likely to be needed for a public purpose, namely, for the construction of staff-quarters, hostel building and playground of the Mission and that the area needed was about 14.11 acres. Notice was given to persons interested in the land specified in the notification to file objection, if any, within thirty days.

It appears that thereafter proceedings were taken under section 5-A of the Act and a report was made to Government. It further appears that as the land was required for the Mission which was to pay the entire expenses and as the Mission came within the definition of the word "company" as given in section 3 (e) of the Act being a society registered under the Societies Registration Act of 1860, proceedings were taken under Part VII of the Act. Sections 39 and 40 lay down that land acquisition proceedings under Part VII will only be taken with the previous consent of the appropriate Government, and that such consent shall not be given unless the appropriate Government is satisfied either on the report of the Collector under section 5-A or by an enquiry held as provided in section 40 that the purpose of the acquisition is to obtain land for the erection of dwelling houses for workmen employed by the company or for the provision of amenities directly connected therewith or

that the acquisition is needed for the construction of a work, and that such work is likely to prove useful to the public. Under section 41 of the Act an agreement is required to be executed in favour of the State Government by the company, and it is after the consent has been given and the agreement executed that notification under section 6 can be issued in view of the provisions of section 39. It appears that an enquiry was made under section 5-A of the Act and a further enquiry was made under section 40 of the Act later on and thereafter the notification under section 6 was issued on 4th October, 1962, in the meantime the Land Acquisition (Amendment) Act XXXI of 1962 had been passed by which sections 40 and 41 had been amended by insertion of clause (aa) in section 40 and of clause (4-A) in section 41. The notification under section 6 having been issued after the amendment, the additions in sections 40 and 41 made by the Amendment Act will have to be taken into account in judging the validity of the proceedings. As an argument has been raised as to the efficacy of the notification under section 6, it is necessary to set it out in full as under :—

“Whereas the Governor is satisfied that land is needed for a public purpose not being a purpose of the Union, namely, for the construction of staff quarters, hostel building and playground of Ramakrishna Mission at Narendrapur in the village of Ukhila Paikpara, jurisdiction list No. 56, P.S. Sonarpur, parganas Maidanmal Zilla 24 parganas, it is hereby declared that a piece of land comprising portion of cadastral plot No. and measuring more or less 14.05 acres, is needed for the aforesaid public purpose at the public expenses of the Ramakrishna Mission within the aforesaid village of Ukhila Paikpara.

This declaration is made under the provisions of section 6 of Act I of 1894, to all whom it may concern.

A plan of the land may be inspected in the office of the Special Land Acquisition Officer, Alipore, 24 parganas.”

After this notification possession was taken of most of the land by the Mission in November, 1962. Then followed the two petitions under Article 226 one on 16th November and the other on 17th November, 1962. A large number of points were raised in the petitions to attack the validity of the land acquisition proceedings. We do not think it necessary however to refer to all those points, particularly those which have been decided against the respondents. But the main argument before the learned Single Judge was that the land acquisition proceedings were bad because the agreement between the State and the Mission was not in compliance with the conditions mentioned in section 41, inasmuch as the terms on which the public would be entitled to use the work to be erected on the acquired land were not set out therein and therefore there could be no issue of a notification in view of section 39 of the Act. The learned Single Judge held that the notification was covered by clause (b) of section 40 (1). As to the provision in the agreement for the use of the work by the public, the learned Single Judge felt bound by a Division Bench decision of his own Court, where a similar provision had been held to be within the fifth term of section 41. He therefore dismissed the petitions.

The respondents then went in appeal to the Division Bench. The main contention before the appeal Court again was that the land acquisition proceedings were bad inasmuch as the agreement between the State and the Mission was invalid as the terms on which the public was entitled to use the work were not set out in the agreement and the provision in clause 8 of the agreement in that behalf was not a sufficient compliance with the fifth term in section 41 of the Act. It was also contended before the appeal Court that consent could be given on any one of the three grounds provided in section 40 (1) and that it was not open to the State Government to give consent on a combination of the grounds provided in clauses (a), (aa) and (b) of section 40 (1). Certain other points were raised before the appeal Court but they were rejected and we shall refer to them in appropriate places while dealing with arguments raised in this Court.

The two learned Judges composing the appeal Court gave separate judgments, though in the result both allowed the appeals. Bose, C.J., held that though the construction of playgrounds and hostels might fall within clause (b) of section 40 (1), the construction of staff-quarters could not fall within that clause. He

repelled the contention that acquisition could not be made for the combined purpose of clause (a), clause (aa) or clause (b), of section 40 (1). But he was of the view that there was nothing to show that the State Government applied its mind to clause (a) or clause (aa) of section 40 (1) when giving consent. He therefore held that as the State Government had applied its mind only to clause (b) of section 40 (1) and as construction of staff-quarters did not come within that clause and as there was nothing to show what part of the land to be acquired was meant for staff-quarters and what part for hostels and playgrounds, the entire acquisition must be held to be bad. On the question whether the fifth term of section 41 had been complied with, the learned Chief Justice relied on the view he had taken in an earlier case and held that it did. Eventually he allowed the appeals.

Mitter, J., who was the other learned Judge of the appeal Court, also held that the consent of the State Government was given only under clause (b) of section 40 (1). He then went on to hold that the fifth term of section 41 was not complied with and therefore the acquisition must be struck down on that ground. He further held that the notification under section 6 said that the acquisition was for a public purpose, but as the entire compensation was to be paid by the Mission and no part of it was to be paid by the State Government, the notification itself was bad. He therefore agreed with the learned Chief Justice that the appeals should be allowed. Then followed the present four appeals on certificates granted by the High Court.

The law on the subject relating to land acquisition whether for a public purpose or for a company is now well settled after the decisions of this Court in *Babu Barkya Takur v. The State of Bombay*¹, *Pt. Jhandu Lal v. The State of Punjab*², *R. L. Arora v. State of U.P.*³ and *Smt. Somavanti v. State of Punjab*⁴. We may refer to the gist of these decisions as given in *Arora's case*³ at page 155 with respect to the notification under section 6 of the Act, whether acquisition is for a public purpose or for a company :—

"In one case, the notification under section 6 will say that the acquisition is for a public purpose, in the other case the notification will say that it is for a company. The proviso to section 6 (1) shows that where the acquisition is for a public purpose, the compensation has to be paid wholly or partly out of public revenues or some fund controlled or managed by a local authority. Where however the acquisition is for a company, the compensation would be paid wholly by the company. Though therefore this distinction is there where the acquisition is either for a public purpose or for a company, there is not a complete dichotomy between acquisitions for the two purposes and it cannot be maintained that where the acquisition is primarily for a company it must always be preceded by action under Part VII and compensation must always be paid wholly by the company. A third class of cases is possible where the acquisition may be primarily for a company but it may also be at the same time for a public purpose and the whole or part of compensation may be paid out of public revenues or some fund controlled or managed by local authority. In such a case though the acquisition may look as if it is primarily for a company it will be covered by that part of section 6 which lays down that acquisition may be made for a public purpose if the whole or part of the compensation is to be paid out of the public revenues or some fund controlled or managed by a local authority."

The first question that falls for consideration is whether the acquisition in this case was for a public purpose in which case the whole or part of the compensation is to come out of public revenues, etc. or for a company in which case the whole of the compensation has to be paid by the company. The argument on behalf of the respondents is that as one reads the notification under section 6 issued in this case, it appears that the acquisition is for a public purpose and not for a company, and therefore in order that the notification may be valid the whole or part of the compensation had to come out of public revenues or some fund controlled or managed by a local authority. It is urged that it is clear in this case that the entire compensation was to be paid by the Mission and therefore when the notification said that the acquisition was for a public purpose it must be held to be invalid. Reliance in this connection has been placed on a decision of this Court in *Shyam*

1 (1961) 2 S.C.J. 392. (1961) 1 S.C.R. 128. 2 S.C.R. 149; (155).

2. (1961) 1 S.C.J. 529. (1961) 2 S.C.R. 459.

4 (1963) 2 S.C.J. 35 : (1963) 2 M.L.J. (S.C.)

3. (1963) 1 S.C.J. 33. (1963) 1 M.L.J. (S.C.)

18 : (1963) 2 An.W.R. (S.C.) 18 (1963) 2

23 : (1963) 1 An.W.R. (S.C.) 23. (1962) Supp. S.C.R. 774.

*Behari v. State of Madhya Pradesh*¹. That decision referred to the law on the subject which we have quoted above from *R. L. Arora's case*² and then turned to the interpretation of the particular notification under challenge in that case. It is therefore of no help in the present case where we have to consider the interpretation of the notification quoted above. The notification here says that the land is needed for a public purpose, namely, for construction of staff-quarters, hostel buildings and playground of Ramakrishna Mission at Narendrapur. Though therefore the notification begins by saying that the land is needed for a public purpose and does not say that it is needed for a company, it does specify for what particular purpose the land is needed, namely, for construction of staff-quarters, hostel buildings and playground of the Mission which as we have already said is a company. The notification therefore does indicate that the land is needed for a company, though it does not say so in so many words. Finally the notification says that the land is needed for "the aforesaid public purpose at the public expense of the Ramakrishna Mission." We must say that this language is rather curious, for if the compensation was to be paid by the Mission it could not be at the "public expense," and in any case the words "the public expenses of the Ramakrishna Mission" are a contradiction in terms. The reasonable interpretation of these words therefore is that the acquisition will be at the expense of the Mission. This is borne out by the fact that the agreement under section 41 which preceded the notification and which must precede it in view of section 39 provides in clause (1) thereof that "all and every compensation in respect of the said land shall be paid by the Mission." There is no doubt that the notification under section 6 is very clumsily drafted and we cannot fail to condemn such clumsy drafting where the notification is the basis of all subsequent proceedings. But on a fair and reasonable reading of the notification under section 6 in this case there can be no doubt that it means that the land is required for a company (namely, the Mission and that it is to be acquired at the expense of the company (namely, the Mission). Therefore the contention on behalf of the respondents that the notification is bad inasmuch as it says that the land is needed for a public purpose and there is no provision for payment of compensation in part or in whole from the public revenues or some fund managed or controlled by a local authority, must fail.

A contrary contention has been raised on behalf of the Mission on the basis of this notification under section 6, and it is urged that in fact no proceedings under Part VII were necessary in this case because the notification was for a public purpose as recited therein and not for a company. It is also urged that compensation in whole or in part was to be paid in the particular case out of public revenues. It may be mentioned that this contention was not urged on behalf of the State of West Bengal for it is not the State's case that any part of the compensation was to be payable out of the public revenues. Learned Counsel for the Mission, however, relied on the presumption contained in section 6 (3) of the Act which lays down that the declaration shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be. It is urged that in view of this presumption the notification is conclusive evidence of the fact that the land is needed for a public purpose as it says so in the opening part. That however in our opinion does not mean that the Court is precluded from enquiring whether the notification that the land was needed for a public purpose was made in fraud of the Act, namely, against the proviso to section 6 (1), which requires that such a notification cannot be made unless part or whole of the compensation comes out of public revenues or some fund managed or controlled by a local authority. In the present case there is evidence in the notification itself that compensation was to be paid by the Mission and not out of public revenues to which we have already referred while dealing with the contention on behalf of the respondents that this was not a notification for acquisition of land for a company. Besides we cannot overlook the agreement which immediately preceded the notification, and that shows that the entire compensation money is to be paid by the Mission. There is

1. (1964) 2 S.G.J. 226.

(S.G.) 23 : (1963) 1 An.W.R. (S.C.) 23 : (1962)

2. (1963) 1 S.C.J. 33 : (1963) 1 M.L.J. 2 (Supp.) S.C.R. 149.

on the other hand no evidence to show that any part of the compensation is to be paid out of public revenues as stated by learned Counsel for the Mission. We have no doubt that if such was the case learned Counsel for the State would have immediately supported the validity of the notification and of subsequent proceedings on this simple ground on the basis of the decision in *Pt. Jhandu Lal's case*¹. We have no doubt therefore that this clumsily drafted notification is really a notification for acquisition of land for a company, the compensation for which acquisition is wholly to come from the company. Therefore it was necessary to comply with Part VII of the Act, and the argument on behalf of the Mission that no proceedings under Part VII of the Act were necessary and what was done under that Part was entirely redundant, must fail.

The next question that requires consideration is whether the acquisition is valid and whether the terms of sections 40 and 41 of the Act were complied with. Consent can be given under section 40 of the Act for any of the three purposes provided therein namely, (a) that the purpose of the acquisition is to obtain land for the erection of dwelling houses for workmen employed by the company or for the provision of amenities directly connected therewith, (aa) that such acquisition is needed for the construction of some building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose; or (b) that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public. It has been held by the appeal Court that in the present case the State Government only considered clause (b) before giving its consent and did not apply its mind to clauses (a) and (aa), though the appeal Court turned down the argument that it was not possible when giving consent to consider more than one clause out of the three mentioned above. Now generally speaking the appropriate Government would not state in so many words whether it was proceeding under clause (a), or clause (aa) or clause (b). The question whether consent has been given under one clause or the other or more than one clause has to be decided on the basis of the agreement and the notification under section 6. We have also no doubt that it is open to the appropriate Government to give consent on being satisfied as to one of the three clauses only or as to more than one clause. In the present case reliance has been placed on behalf of the State Government on as to three clauses and particularly on clauses (aa) and (b), to show that the consent was given after keeping in mind all the three clauses of section 40 (1). The question as to which clause of section 40 (1) was acted upon by the State Government to give consent is important because on that will depend the nature of the agreement which has to be made under section 41. Where the purpose of the acquisition is as mentioned in clause (a), the agreement has to provide for the time within which, the conditions on which and the manner in which the dwelling houses or amenities shall be erected or provided. Where the consent is based on clause (aa), the agreement is to provide for the time within which and the conditions on which, the building or work shall be constructed or executed. Where the consent is given on the basis of clause (b) the agreement is to specify the time within which and the conditions on which the work shall be executed and maintained, and the terms on which the public shall be entitled to use the work. It will be seen from the above that there are bound to be differences in the terms to be embodied in an agreement under section 41 depending upon whether consent is given under clause (a) or clause (aa) or clause (b). We have therefore to scrutinise the agreement to find out under which clause the consent was given. In this connection we have already mentioned that in the view of the appeal Court the consent was given only under clause (b) of section 40 (1).

Now the three purposes which are specified in the notification under section 6 for which the land is to be acquired are construction of (i) staff-quarters, (ii) hostel buildings and (iii) playground. The appeal Court, and in particular the learned Chief Justice, has held that construction of hostel buildings and playground comes within clause (b) of section 40 (1), but that construction of staff-quarters cannot come under that clause. We are of opinion that this view is correct. Hostel buildings and

1. (1961) 1 S.C.J. 529 : (1961) 2 S.C.R. 459.

playground are obviously meant for the students of the institution and such students as a body are a section of the public and therefore the hostels and playground can be directly useful to this section of the public, and may in certain circumstances be used by other sections of the public also, as, for example, the parents or guardians of the students concerned. But so far as staff-quarters are concerned, they are meant for occupation of individual members of the staff. We cannot accept the argument that an individual member of the staff must also be held to be a section of the public and therefore staff-quarters would be useful to the public. That would in our opinion be reducing the idea of what is useful or can be used by a section of the public to absurdity. When we speak of a section of the public we must exclude from it an individual and what can be used by an individual cannot be said to be used by a section of the public which must always be more than one. We therefore agree with the High Court that construction of staff-quarters cannot be brought within the ambit of clause (b) of section 40 (1).

The next question then is whether construction of staff-quarters can be brought within the ambit of clause (a) or clause (aa). It is urged that it can come under clause (aa) which provides that acquisition is needed for the construction of some building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose. It is urged that the Mission is a company. Staff-quarters are obviously buildings. The question however is whether the Mission is engaged or is taking steps for engaging itself in a work which is for a public purpose. In this connection it is urged that the word "work" used in clause (aa) is much wider than the word "industry" used in the same clause, and that if the Mission is engaged in any work which is for a public purpose and the land is required for staff-quarters in connection with that work, the case would be covered by clause (aa). We do not think it necessary for present purposes to decide whether the word "work" used in clause (aa) in the phrase "industry or work" refers to some kind of productive activity which would result in production of goods useful to the public. We shall assume it is wider. But the Mission did not lay any foundation for the argument that the case was covered by clause (aa) in its reply. If the case is to be covered by clause (aa) and the word "work" in the phrase "industry or work" has a wider meaning, it was the duty of the Mission to explain what was the work within this wide meaning for which staff-quarters were required so that the Court may be in a position to judge whether the work was of such a nature as to come within the words "any industry or work which is for a public purpose". We do not know for what particular work the staff-quarters were required and therefore it is in our opinion impossible to accept the contention on behalf of the Mission that the case is covered by clause (aa). Further it does not appear that any such material was supplied to Government either, as the application of 5th October, 1960, merely mentions that the Mission was in urgent need of land for construction of staff-quarters, without further mentioning what was the work in connection with which land was required for such construction. Nor does the agreement show that this aspect of the matter was considered by the Government. We are therefore not prepared to hold in the absence of the necessary material that the land was required for construction of buildings by a company which was engaged in any industry or work which is for a public purpose. We may refer in this connection to the decision of this Court in *R. L. Arora v. State of Uttar Pradesh*¹, in which this Court has held that it is not only to be shown that the company is engaged in any work or industry which is for a public purpose but that it must also be shown that the building or work which is to be constructed on the land to be acquired subserves the same public purpose. It is impossible to hold this unless one knows what is the particular work for which the land is needed. We have already pointed out that the Mission is engaged in a large number of activities and we do not know for what work, out of its so many activities, staff-quarters are required. What we have said above is enforced by the preamble to the agreement which says that the land is needed for the aforesaid pur-

1. (1964) 2 S.C.J. 652 : (1964) 2 M.L.J. (S.C.) 148 : (1964) 2 An.W.R. (S.C.) 148 : (1964) 2 Comp L.J. 309 : A.I.R. 1964 S.C. 1230.

pose, namely, construction of staff-quarters, hostel buildings and playground, and that the said work is likely to be useful to the public, which clearly indicates that it was clause (b) which was under consideration of the Government and not clause (aa), as otherwise we would have found words in the preamble which would be appropriate to clause (aa) also and not merely appropriate to clause (b).

Then it is urged that the case is covered by clause (a) in any case because that provides for erection of dwelling houses for workmen employed by the company. It is said that staff-quarters are meant for the employees of the Mission and they would be covered by the general words *i.e.*, "workmen employed by the company". It may be conceded that building of staff-quarters by the Mission may be included within clause (a) of section 40 (1). The High Court has however found that there was nothing to show that this aspect of the matter was considered by the State Government. But, as we have said earlier, one would not generally find the appropriate Government saying when giving consent whether it is acting under one clause or the other of section 40 (1), and that has to be gathered from the agreement and the notification under section 6 following thereon. When we look at the agreement which preceded the notification we do find specific mention of hostel buildings, playground and staff-quarters for the Ramakrishna Mission. As the construction of staff-quarters may very well come within clause (a) of section 40 (1), it cannot necessarily be said that the Government only considered clause (b) of section 40 (1) and did not consider clause (a) at all. But if one looks at the preamble to the agreement there is in our opinion justification for the view taken by the High Court. The preamble puts all the three purposes together and makes no distinction between them. The State Government apparently thought that construction of staff-quarters stands on the same footing as construction of hostel buildings and playground and considered the necessity of giving consent on the basis of clause (b) only. This is clear from that part of the preamble which says that the State Government being satisfied by an enquiry held under section 40 of the Act that the proposed acquisition, is needed for the purpose of constructing staff-quarters, hostel buildings and playground, and that the said work is likely to prove useful to the public, has consented to acquire the land on behalf of the Mission. The said work in this part of the preamble includes all three, namely, staff-quarters, hostel buildings and playground, and all that the State Government says in connection with the giving of consent is that the said work is likely to prove useful to the public, which are the very words to be found in clause (b). If the State Government was considering clause (a) we would have found words in the preamble which would be appropriate to clause (a). In the circumstances the view taken by the learned Chief Justice that clause (a) was not considered at all by the State Government appears to be correct. His further conclusion that if that is so and the land required for the construction of staff-quarters cannot be brought under clause (b) and the extent of such land is not known, the whole of the notification must be struck down, is in our view correct. On this view of the matter the appeals must fail and it is unnecessary to consider the other two points raised before us.

The appeals therefore fail and are dismissed with costs—one set of hearing fee.

V.K.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, N. RAJAGOPALA AYYANGAR AND R.S. BACHAWAT, JJ.

The State of Rajasthan

.. Appellant*

v.

Mrs. Leela Jain and others

.. Respondents.

Rajasthan City Municipal Appeals (Regulation) Act (III of 1950), section 4 (1) proviso—Construction—Final order of a Municipal authority not subject to a Municipal appeal under the relevant municipal Act under which such order is made—If revisable under proviso to section 4 (1).

Interpretation of Statutes—Omission of words used in statute as being inconsistent with the spirit of the enactment—Permissibility.

The words "orders of a Municipal authority" in the proviso to section 4 (1) of the Rajasthan City Municipal Appeals (Regulation) Act, 1950, would include final orders of a Municipal authority not subject to a Municipal appeal under the relevant Municipal enactments in force in the cities of Rajasthan under which such orders are made. The words "orders of a Municipal authority" in the proviso cannot be read as referring only to appealable orders for which an appeal is provided under the relevant Municipal enactments. Hence, an order of the President of the Municipal Council compounding an offence against a Municipal bye-law under the City of Jaipur Municipal Act, 1943 which is final and is not subject to an appeal under that Act is subject to the revisional jurisdiction of the State Government under the proviso to section 4 (1) of the Rajasthan City Municipal Appeals (Regulation) Act, 1950.

The argument that the intention of the Rajasthan City Municipal Appeals (Regulation) Act as gathered from its Long title, Preamble, and the operative provisions is not to alter the substantive rights of parties but only to provide for a forum for entertaining and disposing of appeals which already existed under the relevant Municipal enactment in the different cities of Rajasthan and that therefore when an order of a Municipal authority is final under the relevant Municipal enactment such an order is not subject to the revisional jurisdiction under the proviso to section 4 (1) cannot be accepted. If this argument has to be accepted the proviso would have to be read deleting the words "or a Municipal authority" occurring therein which cannot be done on any accepted principle of statutory construction.

It is not permissible to omit or delete words from the operative part of an enactment, which have meaning and significance in their normal connotation merely on the ground that according to the view of the Court it is inconsistent with the spirit underlying the enactment. Unless the words are unmeaning or absurd, it would not be in accord with any sound principle of construction to refuse to give effect to the provisions of a statute on the very elusive ground that to give them their ordinary meaning leads to consequences which are not in accord with the notions of propriety or justice entertained by the Court. No doubt, if there are other provisions in the statute which conflict with them, the Court may prefer the one and reject the other on the ground of repugnance. Again when the words in the statute are reasonably capable of more than one interpretation, the object and purpose of the statute, a general compass of its provisions and the context in which they occur might induce a Court to adopt a more liberal or a more strict view of the provisions, as the case may be as being more consonant with the underlying purpose. But it is not possible to reject words used in an enactment merely for the reason that they do not accord with the context in which they occur or with the purpose of the legislation as gathered from the Preamble or Long title. The Preamble may no doubt be used to solve any ambiguity or to fix the meaning of words which may have more than one meaning but it can, however, not be used to eliminate as redundant or unintended the operative provisions of a statute.

The proviso to section 4 (1) is really not a proviso in the accepted sense by an independent legislative provision by which to a remedy which is prohibited by the main part of the section an alternative is provided. The proviso is not co-extensive with but covers a wider field than the main part of section 4 (1).

Appeal by Special Leave from the Judgement and Order dated 7th November, 1958, of the Rajasthan High Court in D. B. Civil Writ Petition No. 65 of 1957.

M. M. Tewari, K. K. Jain and R. N. Sachthy, Advocates, for Appellant.

S. P. Sinha, Senior Advocate (V. Kumar and Naunit Lal, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by :

Rajagopala Ayyangar, J.:—A very short question regarding the proper construction of the proviso to section 4 (1) of the Rajasthan City Municipal Appeals (Regulation) Act, 1950, is involved in this appeal which comes before us by virtue of Special Leave granted by this Court.

The facts giving rise to this appeal are briefly these : The respondent Mrs. Leela Jain is the owner of a plot of land in the city of Jaipur. Under the relevant provisions of the City of Jaipur Municipal Act, 1943, she was required to submit to the Municipal Council plans for erecting constructions on her plot, obtain their approval and make the constructions in accordance with the sanctioned plans. She submitted her plans, which were sanctioned but it was stated that during the course of her constructions she made certain variations from the plan as approved by the Municipal authorities. A neighbour of her's, one D.D. Goswami alleged that the variations made by the respondent in carrying out the constructions of her house prejudicially affected him. On the basis of his representation the Municipal Council initiated an inquiry as a result whereof a report was submitted to it in which a finding was recorded that the respondent had effected variations from the sanctioned plan. The President of the Municipal Board considered the report and passed an order on 19th September, 1956, directing the respondent to stop the unauthorised constructions immediately. It was stated that notwithstanding this order the respondent continued the constructions and completed them. When this was brought to the notice of the Municipal authorities, an order was passed that action be taken against her under section 210 of the City of Jaipur Municipal Act, 1943. This section provides that where an owner or occupier was required to execute any work under the provisions of the Act and a default was made in the execution thereof, the Municipal Board might cause such work to be executed and the expenses incurred thereby to be recovered from the person in default. It is not very clear from the record what exactly was the work which the respondent was directed to carry out and which she failed to execute. The only thing that is necessary to be noticed is that there existed an order under section 210 passed on 26th September, 1956. Representations were made by the respondent to the President of the Municipal Council and thereupon, by an order dated 24th October, 1956, the President ordered that the case against the respondent be compounded by her paying to the Municipal Council a sum of Rs. 101 as fine. It is stated that the respondent paid this fine, but the fact of her having done so is apparently a matter of some controversy to which it is not necessary to refer.

Shri D.D. Goswami, the respondent's neighbour, felt aggrieved by this order compounding the violation of the building bye-laws. No appeal was provided by the Jaipur Municipal Act from such an order, but he moved the State Government to set aside that order and the latter purporting to exercise jurisdiction under the proviso to section 4 of the Rajasthan City Municipal Appeals (Regulation) Act, 1950 (to which we shall hereafter refer as the Act) set aside the order of the President of the Municipal Council. The respondent thereupon invoked the jurisdiction of the Rajasthan High Court under Article 226 of the Constitution of India for issue of a writ of *certiorari* to quash this order of the State Government. Though several contentions were raised by the respondent in support of her plea regarding the invalidity of the impugned order of the State Government, the learned Judges of the High Court confined their attention to one of the points raised that the order of the President of the Municipal Council which was final and not subject to appeal under the City of Jaipur Municipal Act was not subject to the revisional jurisdiction of the State Government under the proviso to section 4 (1) of the Act. The learned Judges of the High Court accepted this contention and acceded to the Writ Petition and passed an order as prayed for. The appellant-State having obtained Special Leave from this Court, has preferred this appeal.

In order to appreciate the contentions urged before us relating to the construction of the proviso to section 4 of the Act, it is necessary to read the main provisions of the Act. It is a short Act containing 5 sections. The Long title states that it was

enacted "to provide for and secure uniformity in the forum for Municipal appeals pertaining to the cities of Rajasthan". Its Preamble carries out what is stated in the Long title and it runs "Whereas it is expedient to provide for and secure uniformity in the forum for Municipal appeals in the different cities of Rajasthan". The different cities, it may be noticed, include *inter alia*, the city of Jaipur with which we are concerned. The main purpose of the Act is, as recited in the Preamble and the Long title, to create a uniform forum for entertaining and dealing with Municipal appeals which lay to different authorities in the several separate Municipal enactments in force in the different cities within the State of Rajasthan.

The officer or authority designated by the Act as the forum for hearing appeals is the Commissioner and the expression "Commissioner" is defined in section 2 which contained definitions of the terms used in the Act, as meaning "Commissioner or Additional Commissioner of the Division within the local limits whereof a Municipal authority exercises jurisdiction". The "Municipal appeals" for which a forum is being provided is, by the Act, treated as a technical term and is defined in section 2 (iii) as meaning "an appeal from an order of a Municipal authority lying under any Municipal law to any officer or authority other than a Municipal authority"; in other words, by "Municipal appeal" is meant an appeal lying under a Municipal law to an outside authority *i.e.*, some designated officer of the Government.

Sections 3 and 4 have a vital bearing on the rival constructions submitted to us by either side and therefore it is necessary to set them out :

"3. *First Municipal appeals.*—(1) Notwithstanding anything contained in any Municipal law, wherever such law provides for a Municipal appeal, the appeal shall, subject to the time-limit prescribed therefor by such law, lie to and be brought before the Commissioner.

(2) All Municipal appeals pending at the commencement of this Act before any officer or authority other than the Commissioner shall be transferred to the Commissioner for disposal.

(3) In any Municipal appeal under this section, the Commissioner shall proceed in the manner provided for such appeal in the Municipal law applicable thereto and the decision thereon of the Commissioner, shall subject to the provisions of sections 4 and 5 be final and conclusive.

(4) When an appeal under this section is pending at the commencement of this Act or has been thereafter preferred, all proceedings to enforce the order appealed against and all prosecutions for a breach thereof may, by order of the Commissioner be suspended pending the decision of the appeal.

4. *Second Municipal appeals and revisions.*—(1) Notwithstanding anything contained in any Municipal law, no Municipal appeal shall lie from any order passed in appeal under section 3 :

Provided that the Government may, of its own motion or on the application of a Municipal authority or of any aggrieved person call for the record of any case for the purpose of satisfying itself as to the correctness, legality or expediency of any order passed by a Commissioner or a Municipal authority and may pass such orders therein as the Government may consider fit and reasonable.

(2) Any Municipal appeal from orders made in appeal by any officer or authority other than a Municipal authority pending at the commencement of this Act, shall be transferred to the Government and be disposed of in accordance with the proviso to sub-section (1).

(3) The provisions of sub-section (4) of section 3 shall *mutatis mutandis* apply also to appeals and applications under this section."

Section 5 contains merely a saving and though not very relevant in the present context, we may quote it for completeness :

"5. *Saving.*—Nothing in this Act shall affect any power other than the power to entertain hear and determine Municipal appeals, vested in the Government by any Municipal law."

The controversy between the parties rest on the meaning and effect of the expression "or a Municipal authority" occurring on the proviso to section 4. It may be mentioned that the expression "a Municipal authority" is defined in section 2 (iv) of the Act and it is common ground that on that definition the President of the Municipal Council who passed the order which was set aside by the State Government was a Municipal authority.

Before considering the arguments addressed to us it would be convenient to briefly advert to the reasoning by which the learned Judges held that the State Government had no jurisdiction to entertain the revision against the order of the Chairman of the Municipal Council which, as stated already, was not under the provisions of the City of Jaipur Municipal Act subject to an appeal either to a Municipal authority or to an outside party. In the first place, the learned Judges considered that the Long title, the Preamble and the operative portion of the enactment other than the crucial words of the proviso all pointed to the enactment not being intended to alter the substantive rights of parties but only to provide a new forum for entertaining and disposing appeals which already existed under the relevant Municipal enactments. If, as was admitted, an order of the President of the Municipal Council compounding an offence against a Municipal bye-law was under the City of Jaipur Municipal Act final and not subject to an appeal or any other kind of interference, they held that it could not be the intention of the Act to confer a right on the Government to interfere with such orders. This, one might say, proceeds on the textual construction of the Act. The other line of reasoning which according to the learned Judges pointed to the same conclusion was that the City of Jaipur Municipal Act was intended to confer on the inhabitants of the Municipal area and their representatives on the Municipal Council the right of local self-Government and it was inconsistent with that basic conception to read the Act as making such an inroad on local autonomy as to permit the Government to interfere in cases where under the Municipal Act an order was final and immune from challenge.

It would, however, be seen that the construction adopted by the learned Judges does not give any effect to the words 'or other Municipal authorities' in the proviso and, in fact, on their interpretation the words had no meaning and in reality, though not in terms have been rejected as inconsistent with the theory of the local self-Government.

With due respect to the learned Judges we do not find it possible to agree that it is permissible to omit or delete words from the operative part of an enactment, which have meaning and significance in their normal connotation merely on the ground that according to the view of the Court it is inconsistent with the spirit underlying the enactment. Unless the words are unmeaning or absurd, it would not be in accord with any sound principle of construction to refuse to give effect to the provisions of a statute on the very elusive ground that to give them their ordinary meaning leads to consequences which are not in accord with the notions of propriety or justice entertained by the Court. No doubt, if there are other provisions in the statute which conflict with them, the Court may prefer the one and reject the other on the ground of repugnance. Surely, that is not the position here. Again, when the words in the statute are reasonably capable of more than one interpretation the object and purpose of the statute, a general conspectus of its provisions and the context in which they occur might induce a Court to adopt a more liberal or a more strict view of the provisions, as the case may be, as being more consonant with the underlying purpose. But we do not consider it possible to reject words used in an enactment merely for the reason that they do not accord with the context in which they occur, or with the purpose of the legislation as gathered from the Preamble or Long title. The Preamble may, no doubt, be used to solve any ambiguity or to fix the meaning of words which may have more than one meaning, but it can, however, not be used to eliminate as redundant or unintended, the operative provisions of a statute. Besides, if one strictly applied this rule of interpretation that the Act did not intend to make provision for nothing except a forum for appeals—the whole of the proviso even where it provided for revisions against the orders of a Commissioner, must be rejected as travelling beyond the Long title and the Preamble, for in neither of them is reference made to revisions. We do not therefore consider that in the case of the Act under consideration, it would be possible to reject the words "or a Municipal authority" by reference to the Preamble and the Long title.

Coming next to the words used, we start with the position that under section 3 of the Act, appeals from Municipal authorities to outside authorities which are designated "Municipal appeals" by the Act are to be filed before and disposed of only by the Commissioner. If any appeals were pending before authorities designated by the several Municipal enactments, they were directed to be transferred to the Commissioner and to be disposed of by him section [3 (2)].

Then comes section 4 (1) by which the finality of the orders of the Commissioner declared by section 3 (3) was repeated and reinforced by the use of the words "notwithstanding anything contained in any Municipal law," so that even if a second appeal or other proceeding had been permitted by the Municipal law against orders of an outside authority passed in Municipal appeals as defined by section 2 (3) of the Act (*sic*). But this finality was not absolute as indicated by section 3 (3) but could be imperilled by a revision to a State Government. This is effected by the proviso to section 4 (1) and if the learned Judges of the High Court are right, the proviso has done nothing more.

The question for our consideration is whether any effect can or should be given to the words "the Government may on its own motion or on the application of a Municipal authority or of any aggrieved person call for the record of any case . . . for the purpose of considering the correctness of any orders passed by a Municipal authority." Before entering on a discussion of this question it might be convenient to put aside the arguments addressed to us by the learned Counsel for the respondent that these words occurring as they do in a proviso are to be construed differently from what they would have been if they occurred as an independent provision. This, to some extent, also figures as part of the reasoning of the learned Judges of the High Court who have cited a few decisions one of which was of the Privy Council and the other of this Court in which the construction of a proviso came up for consideration. These cases may be thus summarised. In some of them a question has arisen as to whether the terms of a proviso could be called in aid to determine the scope of the main part to which it is a proviso. This approach and its limitations need not detain us, for obviously that is not the principle that arises for examination in the case before us. There are other decisions to which learned Counsel for the respondent drew our attention in which the question to be considered was whether the proviso was really redundant *i.e.*, enacted *ex abundi cautela*. No such principle arises for consideration in the proviso before us either. So far as a general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operative part. It is obvious that this is not the function of the proviso to section 4 (1) of the Act, for the operative words in the main part of section 4 (1) prohibit all appeals from the appellate orders of the Commissioner. The primary purpose of the proviso now under consideration is, it is apparent, to provide a substitute or an alternative remedy to that which is prohibited by the main part of section 4 (1). There is, therefore, no question as to the proviso carving out any portion out of the area covered by the main part and leaving the other part unaffected. What we have stated earlier should suffice to establish that the proviso now before us is really not a proviso in the accepted sense but an independent legislative provision by which to a remedy which is prohibited by the main part of the section, an alternative is provided. It is further obvious to us that the proviso is not co-extensive with but covers a field wider than the main part of section 4 (1). If its function were only to provide a remedy alternative to a further appeal from the orders of the Commissioner and no more and that is the contention of the learned Counsel for the respondent, the words 'of any order passed by a Municipal authority' should have no place in it. If this submission has to be accepted, the proviso would have to be read deleting the words "or other Municipal authority." As already pointed out, this rejection cannot be done on any accepted principle of statutory construction, for the words have meaning and effect can be given to them without the same conflicting with any other operative provision of the Act.

If the argument that the words should be rejected is not accepted and some meaning had to be attributed to these words, the alternative submission of the learned Counsel for the respondent was that we should read the words 'orders passed' as confined to orders which were appealable orders for which an appeal was provided under a Municipal law. In this connection it was urged that the intention of the framers of the Act was merely to enact a legislation providing for an uniform forum in which appeals for which diverse provisions were made in the Municipal laws of the several Municipalities in the State were to be entertained and disposed of and it would be inconsistent with such an intention to hold that they made a provision for Government revising orders which according to the relevant Municipal law were final and not subject to any appeal. This argument though plausible does not appear to us to be sound or maintainable on any proper construction of the words employed. If the learned Counsel is right, the clause would read "The Government may.....call for any record of any case..... of any *appealable* order passed by a Commissioner or by a Municipal authority and may pass such orders.....". This would show how impossible it is to read the word 'order' as confined to appealable orders which is what the learned Counsel suggests as the proper construction of the proviso, for it would at once be seen that there are no appealable orders of the Commissioner, since section 4 (1) has in terms prohibited all appeals. As the words 'orders of' are not repeated before the words 'a Municipal authority,' you cannot read the word 'order' as meaning 'orders declared final by this Act' when applied to the orders of a Commissioner and as meaning 'orders subject to appeal under a Municipal law' in relation to the order of a Municipal authority. Besides, it would be somewhat anomalous that section 3 should provide the forum for appeals which lay under the Municipal Act and in regard to the same matter *i.e.*, those in regard to which a Municipal appeal would lie, make a parallel provision for a revision by the State Government without clearer words. We do not consider it necessary to examine this matter further or to examine the other anomalies which this construction might involve, because we are in this case concerned with a non-appealable order of a Municipal authority. So far as they are concerned, such orders would be in exactly the same situation as regards their finality as the orders of a Commissioner, which by reason of the positive provisions of section 3 (3) and section 4 (1) are expressly declared final by the Act. It appears to us that the more reasonable construction is to construe the words 'orders of a Municipal authority' as including final orders not subject to a Municipal appeal which would fall into the same category as appellate orders of a Commissioner which are declared final by the Act.

It is, no doubt, true that so to construe these words could empower a State Government to interfere in Municipal affairs and this on an extensive scale and enable them to pass orders in revision, on matters which under the relevant Municipal law was final and not subject to any appeal. That is an aspect which appealed greatly to the learned Judges of the High Court and as we have pointed out earlier, forms the main reasoning on which they have arrived at the construction of the proviso. Though we are not unmindful of the consequences and implications of this construction, we consider that it would not be proper to take these factors into consideration where the words of the statute are clear and what we have stated earlier should suffice to show that, in our opinion the opposite construction is not reasonably open without doing violence to the language of the enactment either by omitting the words "or other Municipal authorities" altogether or by rewriting the section so as to achieve the desired result. We do not conceive this to be the function of a Court of construction but that it must be left to other organs of Government. We, therefore, consider that the learned Judges of the High Court were in error in holding that the State Government had no power to entertain the revision against the order of the President of the Municipal Council and to quash it on that ground.

As already indicated in the Writ Petition under Article 226 filed by the respondent to the High Court she based her attack on the validity of the order of the State Government not merely on the ground that it was beyond their revisional jurisdiction,

but on various other grounds. The learned Judges of the High Court having reached a conclusion in her favour on this ground, observed in the course of their judgment :

"The order of the Government is without jurisdiction and must be quashed on this ground alone. It is not necessary to go into the other grounds raised in this petition."

The learned Counsel for the respondent drew our attention to this passage and submitted that should we allow the appeal on our construction of the proviso to section 4 (1), we should remand the case to the High Court for considering the other objections that were raised. Though the learned Counsel for the appellant submitted that we might ourselves deal with the other points, we do not accede to this request. In our opinion, the case has to be sent back to the High Court for all the other objections being considered on their merits as may arise on the pleadings and in law. We are not to be understood as having expressed any opinion as to whether any such point arises or their merits.

The appeal is accordingly allowed and the order of the High Court allowing the Writ Petition is set aside and the matter is remanded to the High Court for being disposed of in accordance with law and with this judgment. The costs of the parties in this Court will abide the result and will be provided for by the High Court in its final order.

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HADAYA-TULLAH, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Amin Lal

.. *Appellant**

v.

Hunna Mal

.. *Respondent.*

Representation of the People Act (XLIII of 1951) (as amended in 1956), sections 79 (b), 82 (b), 90 (1), 90 (3) and 123—Power to dismiss election petition under section 90 (3)—If can be exercised after amendment of the petition—Allegation of corrupt practice against a duly nominated candidate who has withdrawn his candidature—Such a person if a necessary party—Amendment to election petition—Power of Election Tribunal to allow—Discretion of Election Tribunal to add parties under Order 1, rule 10 of Civil Procedure Code (V of 1908)—Interference by Supreme Court—Practice.

An election petition can be dismissed under section 90 (3) of the Representation of the People Act (XLIII of 1951) even after it has been amended. The argument that what section 90 (3) contemplates is a petition as originally filed and not as amended is untenable. The power of the Election Tribunal to dismiss an election petition is not in any way affected by the fact that it was not dismissed by the Election Commission under section 85. Indeed, section 90 (3) gives an independent power to the Tribunal to dismiss an election petition on the ground of non-compliance with the provisions of sections 81 and 82 despite the fact that the Election Commission has not chosen to dismiss it upon those grounds under section 85. Since an election petition can be permitted by the Tribunal to be amended, a petition which has been amended would from the date of amendment be the only petition before it. Therefore, that would be the petition with respect to which it could exercise the powers conferred upon it by section 90 (3). It would therefore follow that the power conferred under section 90 (3) will not be taken away by reason of an amendment of the election petition.

A person who was duly nominated as a candidate for election would not cease to be a candidate for the purposes of section 82 (b) merely because he withdrew his candidature within the time allowed by law. Therefore where an election petition contains any imputation of corrupt practice against such a person it could not be regarded as properly constituted and is liable to be dismissed under section 90 (3) unless he was impleaded as a respondent, whether such imputation of corrupt practice is contained in the election petition as originally filed or is introduced for the first time by way of an amendment.

Thus, where an allegation of corrupt practice—an allegation that certain pamphlets couched in language which tended to spread hatred between the Sikhs and the non-Sikhs in the State of Punjab were distributed held amounted to an allegation of corrupt practice within the meaning of section 123 against a duly nominated candidate who had withdrawn his candidature within the time allowed by law is introduced for the first time by way of an amendment to an election petition and the election petition becomes defective by reason of such amendment, the person against whom such allegation is made not having been added as a party to the election petition, the Tribunal will be justified in dismissing the election petition as amended under section 90 (3) for non-compliance with section 82.

The Election Tribunal has power to allow or direct an amendment of the election petition under Order 6, rule 17 of the Code of Civil Procedure (V of 1908). But it has no power to grant an amendment so as to enable the petitioner whose petition did not comply with the provisions of section 81 or 82 of the Representation of the People Act (XLIII of 1951) to remedy the defect. Similarly where an election petition has become defective by reason of an amendment it would be grossly improper to allow a further amendment for avoiding the penalty under section 90 (3).

A party can avail himself of the provisions of Order 1, rule 10 of the Code of Civil Procedure (V of 1908) subject to the law of limitation. Under section 81 of the Representation of the People Act (XLIII of 1951) an election petition has to be presented within 45 days of the date of the election of the returned candidate. Assuming that the Election Tribunal can permit joinder of parties an application under Order 1, rule 10 filed before an Election Tribunal more than eight months after the election of the returned candidate would be inordinately late and could not be granted. Further, the power conferred on the Court by Order 1, rule 10, is a discretionary one and the Supreme Court would not lightly interfere with what the Election Tribunal had done under that provision.

Appeal from the Judgment and Order, dated the 27th August, 1963, of the Punjab High Court in F.A.O. No. 4-E of 1963.

M. C. Setalvad and *Ananda Swaroop*, Senior Advocates (*Janardhan Sharma*, Advocate, with them), for Appellant.

Veda Vyasa, Senior Advocate (*B. D. Jain*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Mudholkar, J.—The short point for consideration in this appeal from the judgment of the Punjab High Court is whether the Election Tribunal, Rohtak, was justified in dismissing the election petition under sub-section (3) of section 90 of the Representation of the People Act, 1951 (hereafter referred to as the Act) preferred by the appellant on the ground that it did not comply with the provisions of section 82 of the Act.

The appellant is a voter in 64-Hissar City Constituency of the Punjab Legislative Assembly and the respondent was a candidate for election to the Assembly from the constituency, the polling in which took place on 24th February, 1962. Eleven persons had been nominated for election from that constituency, one of whom was Suraj Bhan, brother of the respondent. Five candidates, including Suraj Bhan, withdrew their candidature within the time prescribed for the purpose with the result that names of only six candidates were published under section 38 of the Act. Several grounds were set out by the appellant in his election petition for setting aside the election. One of those grounds was that the respondent, his agents and other persons acting with the consent of the respondent were guilty of committing corrupt practices. In paragraph 9 (c) (i) of the petition as presented to the Election Commission on 8th April, 1962 the appellant had alleged as follows :

“That the respondent by himself and through his agents with his consent has been guilty of the corrupt practice of promoting or attempting to promote feelings of enmity and hatred between different classes of the citizens of India on grounds of religion, community, and language. The respondent was in fact a candidate sponsored by Shri Devi Lal of Chautala, a rebel Punjab Congress leader who had left the Congress fold and joined hand with Professor Sher Singh, leader of the Haryana Lok Samiti. The very creed of this Samiti was the promotion of or attempt to promote feelings of enmity and hatred between the residents of the Punjab region and residents of Hindi region. This Samiti has in a way divided the Punjab State into two communities Punjabis and non-Punjabis. The Chief target of the leaders, workers, candidates sponsored by the Samiti and their agents and workers were the Congress candidates, who were pitched against them in every constituency of the Hindi region whom they described as being the henchmen of Shri Pratap Singh Kairon, the Chief Minister of the Punjab, who

according to respondent and his agents was a staunch Sikh and chief supporter of the cause of the residents of Punjabi region at the cost of the residents of the Hindi region and specially the non-Sikhs among them. They described the Congress candidate Shri Balwant Rai in this constituency as being an enemy of the residents of Hindi region specially and non-Sikh residents of the Hindi region and preached that if elected he would be a great obstacle in the way of the non-Sikh residents of the Hindi region and would be a cause of the death knell of Hindi language as well. This poisonous propaganda on the basis of two communities Punjabis and non-Punjabis and also on the basis of two religions Sikhs, and non-Sikhs and on the basis of two languages Hindi and Punjabi was resorted to by the respondent his chief agent Shri Devi Lal with his consent throughout the constituency right from the date of the filing of the nomination paper by the respondent up to the date of poll through the various pamphlets, posters and the writings in the paper titled as 'Haryana Kesri' a mouthpiece of the ideology of Sri Devi Lal rebel Congress leader. These pamphlets, posters and newspapers containing the poisonous propaganda were got published by the respondent or by the office of the group headed by Ch. Devi Lal from the office of the 'Haryana Kesri' controlled by Shri Devi Lal with the consent of the respondent and got distributed by the respondent through his workers and agents throughout the constituency at a large scale. These writings will be got produced later on when available."

In the written statement filed by the respondent on 11th July, 1962, he raised certain preliminary objections, one of which was to the effect that the petition failed to comply with the requirements of the provisions of section 83 (1) of the Act as it did not contain a concise statement of material facts and as it did not set out full particulars of the alleged corrupt practices. According to him the allegations were false and that the vagueness consisted in failing to give the names of the agents or other persons who were alleged to have committed corrupt practices. The appellant in his reply asserted that all the known particulars so far as possible in respect of the various allegations of corrupt practices had been given in detail. Thereupon the Tribunal framed the following preliminary issue :

"Whether any of the allegations of alleged corrupt practices as detailed in paragraph 9 of the petition, are vague, indefinite and devoid of particulars as required by law and if so, to what effect ?

After hearing the parties on this preliminary point the Tribunal gave its finding on 3rd September, 1962. According to the Tribunal the petition suffered from the defects pointed out by the respondent. It, therefore, gave an option to the appellant either to apply for leave to amend the petition or to amplify the particulars of corrupt practices in the light of the observations made by it in its order and directed that if the appellant did not choose to do either of these things the charges which were vague would be struck off. In pursuance of this order the appellant made an application for amendment of the petition and filed along with it an amended petition. This was done on 6th September, 1962. One of the portions of the petition which was amended was the latter part of paragraph 9 (c) (i) and as amended it reads thus :

"This poisonous propaganda on the basis of two communities Punjabis and non-Punjabis and also on the basis of two religions Sikhs and non-Sikhs and on the basis of two languages Hindi and Punjabi was resorted to by the respondent, his chief agent Shri Devi Lal with his consent throughout the constituency through the various pamphlets. One of the pamphlets titled '*Phoolon Ki sej se Kanton ki rah per mager kion ?*' Containing the speech of Shri Devi Lal, dated 5th February, 1962 of the type the one of which is attached with this amended petition, the title page of which purports to have been printed from the Half-Tone Art Press, Delhi by one Dr. Ganpati Singh Verma, 3, Darya Ganj, Delhi, as its publisher and the rest of which purports to have been printed at Shivji Mudranalya, Kinari Bazar, Delhi. And the other one titled, 'The case of Haryana and Hindi Region' by Professor Sher Singh, President, Haryana Lok Samiti presented to Dass Commission in which the case of Haryana was put in before the Dass Commission by Professor Sher Singh in such a way as to spread hatred between the Sikhs and non-Sikhs population of Punjab State through the various figures given in it of the State Government servants of all ranks employed in the two regions, were distributed by respondent No. 1, his brother Sh. Suraj Bhan and his near relation Shri Laxmi Chand Gupta, Contractor Gurgaon at a large scale in Hissar town on the 11th February, 1962 and at Adampur Mandi and Uklana Mandi on the 12th February, 1962 and at Barwala on the 13th February, 1962."

On 9th September, 1962 the respondent filed a written statement in answer to the amended election petition. In respect of paragraph 9 (c) (i) the respondent besides denying the contents of that paragraph, again asserted that the allegations were vague. This was followed by the replication by the appellant dated 11th September, 1962. On 12th September, 1962 issues were framed. On that very day the respondent preferred an application before the Tribunal for dismissing the petition under section 90 (3) of the Act. One of the grounds on which he sought the dismissal of the petition was that Suraj Bhan who was alleged by the appellant to have been guilty of corrupt practices was a candidate validly nominated for election, that

he was a necessary party to the petition and that as he was not made a party thereto the petition was liable to be dismissed under sub-section (3) of section 90 of the Act. On 16th November, 1962 the appellant filed a reply to the respondent's application in which he said that the allegation against Suraj Bhan was not of corrupt practices and that Suraj Bhan could not be said to have been a candidate for election within the meaning of section 82 (b) of the Act. He further contended that the requirement of making a candidate a party does not extend to the amended petition especially when the amended petition was filed in pursuance of an order of the Tribunal. On the same day he made an application under Order 1, rule 10 of the Code of Civil Procedure for permission to join Suraj Bhan as a respondent to the petition. In paragraph 9 of that application the appellant made an alternative prayer to the effect that in case he was not permitted to join Suraj Bhan as a respondent to the petition he may be allowed to further amend the petition by the deletion of the word "his brother Shri Suraj Bhan" in paragraph 9 (c) (i) of the amended petition, in the 5th line from the bottom of clause (c) (i) of paragraph 9. His application was opposed by the respondent. The Tribunal, after hearing the parties dismissed the appellant's application dated 16th November, 1962 as well as the election petition. The appellant then preferred an appeal before the High Court of Punjab but that appeal failed. The High Court, however, granted him a certificate under Article 133 (1) (c) of the Constitution and that is how it has come up to this Court.

The ground on which the petition has been dismissed by the Tribunal is that it does not comply with the requirements of clause (b) of section 82. The relevant provision reads thus :

"A petitioner shall join as respondent to his petition—

tion." (b) any other candidate against whom allegations of any corrupt practice are made in the petition."

Clause (b) of section 79 defines a candidate thus :

"'candidate' means a person who has been or claims to have been duly nominated as a candidate at any election, and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate ;"

Suraj Bhan was a duly nominated candidate and though he withdrew his candidature within the time permitted by the Rules he must, for the purpose of section 82, still be regarded as a candidate. As pointed out by this Court in *Mohan Singh v. Bhanwar Lal*¹, a person who was duly nominated as a candidate for election would not cease to be a candidate for the purpose of Parts VI, VII and VIII of the Act merely because he withdrew his candidature. Therefore, according to this Court where a petition contained any imputation of corrupt practice against such a person it could not be regarded as properly constituted unless he was impleaded as a respondent.

Mr. Setalvad's contention, however, is that what sub-section (3) of section 90 of the Act contemplates is a petition as originally filed by the petitioner and not an amended petition. His argument is that under this provision not merely the Tribunal but also the Election Commission has the power of dismissing an election petition on the ground that it does not comply with the provisions of section 82. Since there is, according to him, no provision for amendment of an election petition during the time the Election Commission is seized with it, and since under sub-section (3) of section 90 the powers of the Tribunal are identical with those of the Election Commission under section 85, we must take the expression "election petition" to mean an unamended election petition. It is not necessary for us to consider whether the Election Commission can permit amendment of an election petition, but assuming that it has no such power it does not follow that the Tribunal to whom the petition has been sent for trial has no power to dismiss it after it has been amended by the petitioner. The procedure regarding the trial of election petitions is contained in Chapter III of the Act, the first section in which is section 86. That section deals with

the appointment of an Election Tribunal. It provides that if the petition is not dismissed under section 85 by the Election Commission, it shall be referred to a Election Tribunal for trial. Sub-section (1) of section 90 provides that subject to the provisions of the Act and Rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits. Under Order 6, rule 17 of the Code of Civil Procedure a civil Court has power to permit amendment of pleadings and, therefore, it is obvious that the Tribunal can exercise the same power with respect to a petition referred to it for trial as the civil Court. Sub-section (3) provides that the Tribunal shall dismiss the petition if it does not comply with the provisions of section 81 or section 82 notwithstanding that it has not been dismissed by the Election Commission under section 85. It would follow from this that the power of the Tribunal to dismiss an election petition is not in any way affected by the fact that it was not dismissed by the Election Commission under section 85. Indeed, this provision gives an independent power to the Tribunal to dismiss an election petition on the ground of non-compliance with the provisions of sections 81 and 82 despite the fact that the Election Commission has not chosen to dismiss it upon those grounds under section 85. Since an election petition can be permitted by the Tribunal to be amended, a petition which has been amended would, from the date of amendment, be the only petition before it. Therefore, that would be the petition with respect to which it could exercise the powers conferred upon it by sub-section (3) of section 90. To hold otherwise would lead to the result that the powers conferred by the Legislature on the Tribunal by this provision will become non-exercisable in respect of one category of election petitions. There is nothing in section 90 which deprives the Tribunal of any of the powers conferred upon it by the aforesaid provision. No other provision has been brought to our notice which has the effect of taking away the express powers conferred by sub-section (3) of section 90 on the Tribunal by reason of an amendment of the petition. We cannot, therefore, accept his contention.

The next contention is that there was no allegation of corrupt practice against Suraj Bhan. We have already set out the amended portion of paragraph 9 (c) (i) of the petition and there the appellant had clearly alleged that certain pamphlets were distributed, amongst others, by Suraj Bhan, one of which was titled: "*Phool on ki se j se Kanton ki rah, per mager kion?*" and the other was "The case of Hariana and Hindi region". It is alleged that these pamphlets were couched in language which tended to spread hatred between the Sikhs and non-Sikhs in the State of Punjab. Under sub-section (3-A) of section 123 of the Act the promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community or language, by a candidate or his agent or any other persons with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate amounts to a corrupt practice. The allegations against Suraj Bhan are thus obviously allegations of corrupt practice.

Mr. Setalvad then contended that the appellant did not thereby allege that it was the intention of Suraj Bhan to promote or attempt to promote feelings of enmity etc. He also contended that the allegations in the petition are, strictly speaking, against the respondent and not Suraj Bhan and that merely alleging that Suraj Bhan distributed the pamphlets without imputing to him the knowledge, express or implied, of the contents of the pamphlets does not amount to an allegation of corrupt practice. In support of this he pointed out that the appellant had expressly submitted to the Tribunal that no allegation of corrupt practice was ever intended to be made against Suraj Bhan. This is not quite correct because the Tribunal in paragraph 16 of its order has observed as follows :

"It has not been seriously challenged and in fact it cannot be challenged that the allegations made against Suraj Bhan in the amended petition amount to allegations of corrupt practice."

Apart from that the allegation against the respondent himself is in practically the same terms as that against Suraj Bhan and other persons, mentioned in paragraph 9 (c) (i) of the petition. The appellant did not say in his petition that the respondent had knowledge express or implied of the contents of the pamphlets. Yet, according to him, he was guilty of corrupt practice by distribution and causing the distribution of the pamphlets through Suraj Bhan and others. If the averments contained in the aforesaid paragraph are, therefore, not to be regarded as allegations of corrupt practice against Suraj Bhan they could also not be regarded as allegations of that type against the respondent. If that were so, the whole of paragraph 9 (c) (i) would lose its meaning and significance. Indeed, both the High Court and the Tribunal have regarded the allegations therein as allegations of corrupt practices and we ourselves do not see how else they could be construed.

Mr. Setalvad then contended that the Tribunal had no power to allow or direct the amendment of the election petition as it is not a suit between two parties but is a proceeding in which the entire constituency is interested and referred in this connection to two decisions of this Court in *K. Kamaraja Nadar v. Kunju Thevar*¹, and *Mallappa Basappa v. Basavaraj Ayyappa*².

In the Act as it stood prior to its amendment in 1956 the provisions of the Code of Civil Procedure relating to trial of suits were made applicable to trial of election petitions by section 90 (2). Those provisions are now reproduced in section 90 (1) of the Act. As regards allegations of corrupt and illegal practices section 83 (2) provided, as does section 83 (1) (a) now, that full particulars of the parties alleged to be guilty of such practices be given. Sub-section (3) empowered the Tribunal to permit amendment of the particulars. This latter provision has been deleted. But while it was still in force this Court held in *Harish Chandra Bajpai v. Triloki Singh*³, that despite this provisions, the Tribunal had power to permit amendment under Order 6, rule 17, Code of Civil Procedure, in regard to matters other than those, falling within sub-section (3) of section 83. Bhagwati, J., who was a party to, this decision and who delivered the judgment of the Court in the two cases earlier referred to has not expressed any dissent from this view. What he did say in those cases, in so far as permission to amend is concerned was that the Tribunal had no power to grant it so as to enable the petitioner whose petition did not comply with the provisions of section 81 or section 82 to remedy the defect. In the case before us, the Tribunal did not, by giving an option to the appellant either to amend the petition or furnish particulars or to have paragraph 9 (c) (i) struck off as being vague enable the appellant to remove a defect pertaining to the presentation of a petition or joinder of parties (which are matters dealt with by sections 81 and 82). We agree, with what has been said in *Harishchandra Bajpai's case*³, and hold that the Tribunal was competent to allow or give an option to the appellant to amend the petition.

The next contention of learned Counsel is that since the petition had become defective by reason of the amendment the Tribunal should either have permitted the appellant to join Suraj Bhan as a respondent or to further amend the petition by deleting reference to Suraj Bhan. A party can avail himself of the provisions of Order 1, rule 10, Civil Procedure Code, subject to the law of limitation. Assuming that a Tribunal can permit the joinder of parties, we must point out that under section 81 of the Act an election petition has to be presented within 45 days of the date of the election of the returned candidate. The application under Order 1, rule 10, was made more than eight months after the election of the respondent and was thus inordinately late and could, therefore, not be granted. As regards joinder of Suraj Bhan in exercise of the powers conferred on a Court by Order 1, rule 10 (2) all that we need say is that the matter was in the discretion of the Tribunal and we would not lightly interfere with what the Tribunal has done. As regards the last submission, it cannot be forgotten that the appellant did have the choice when the Tribunal made its order on 3rd September, 1962 to decline to amend and suffer

1. (1958) S.C.R. 583.
2. (1958) S.C.R. 611.

3. (1957) S.C.J. 297. (1957) S.C.R. 370:
A.I.R. 1957 S.C. 444.

paragraph 9 (c) (i) being struck off. He chose to amend and has lost the right to adopt the alternative. Moreover, though the decision in *K. Kamaraja Nadar's case*¹, may not strictly apply, to allow a further amendment for avoiding the penalty under section 90 (3) of the Act would have been grossly improper and the Tribunal was right in rejecting it.

In the circumstances we dismiss the appeal but make no order of as to costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

The Municipal Corporation of Greater Bombay

.. *Appellant**

v.

Lala Pancham and others

.. *Respondents.*

Civil Procedure Code (V of 1908), Order 6, rule 17 and Order 41, rule 27—Amendment of plaint—Power of Court to allow—Limitations—Power of appellate Court to admit fresh evidence—When can be exercised—Court if can compel parties to examine any particular witness.

Bombay Municipal Corporation Act (III of 1888), as amended by Bombay Act (XXXIV of 1954), sections 354-R, 354-RA and Schedule GG—Validity of sections 354-R and 354-RA—Restrictions placed on tenants' rights by the sections—If unreasonable—If violative of Article 19 (1) (f) of Constitution of India (1950)—Tenant if can file suit challenging a clearance order.

An amendment allowed by a Court cannot be challenged merely because it was sought at the suggestion of the Court unless there are grounds for holding that it was forced upon an unwilling party. For, the Court wanting to do justice may invite the attention of the parties to defects in pleadings so that they could be remedied and the real issue between the parties tried. But a party should not be allowed to make out a new case by way of an amendment to the pleading. Thus, the plaintiff cannot be allowed to amend the plaint so as to enable him to make out a case for which there is not the slightest basis in the plaint as it originally stood.

No doubt under Order 41, rule 27 of the Civil Procedure Code, the High Court at the appellate stage has the power to allow a document to be produced and a witness to be examined. But the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. The power under Order 41, rule 27 (1) (b) cannot be exercised for adding to the evidence already on record except upon one of the grounds specified in the provision. The High Court cannot order a virtual re-trial under Order 41, rule 27 of the Civil Procedure Code.

A Court cannot compel a party to examine any particular witness. Just as it is not open to a Court to compel a party to make a particular kind of pleading or to amend his pleading, so also it is beyond its competence to virtually oblige a party to examine any particular witness.

A tenant is entitled to raise an objection to the making of a clearance order by the Municipal Corporation of Bombay in exercise of the powers conferred by sections 354-R and 354-RA of the Bombay Municipal Corporation Act, 1888, as amended by Bombay Act (XXXIV of 1954) not only under section 354-RA but also under clause (2) of Schedule GG of that Act. It is no doubt true that there is no express mention of tenants in either of these provisions but from the fact that clause (a) of section 354-RA(4) requires the publication of the clearance order it would be reasonable to infer that the object of doing so is to invite objections at the instance of persons who would be affected by the order. Since tenants would be affected by it, they fall in this class.

That a right has been conferred upon a tenant to lodge an objection against a clearance order is further made clear by the provisions of clause (2) of Schedule GG to the Bombay Municipal Corpora-

tion Act, 1888, under which a right has been conferred upon "any person aggrieved" to prefer an appeal against a clearance order. The expression "any person aggrieved" is sufficiently wide to include not only a tenant but also an occupant of a building who is likely to be dishoused as a result of the action taken under a clearance order. It is true that ordinarily a right of appeal is conferred on a person who is a party to the proceeding but that would be so only where the proceeding is between certain parties. A proceeding of the nature contemplated by section 354-R is not, strictly speaking a proceeding between the parties ranged on opposite sides. What is contemplated is the exercise of certain powers by the Corporation which will affect the interests of a variety of persons or a class or classes of persons and clause (2) of Schedule GG gives a right to any of them to prefer an appeal if his legal right or interest is affected by any action by the Corporation taken in pursuance of its powers.

Upon a reasonable construction of section 354-RA and Schedule GG it must, therefore, be held that they afford opportunities to tenants to object to the clearance order. It follows from this that the restrictions on the tenants' right to hold property enacted by sections 354-R and 354-RA are not unreasonable and that the contention that they are *ultra vires* of Article 19 (1) (f) of the Constitution of India (1950) must fail.

Finality is given to a clearance order after its confirmation by the State Government and its publication in the manner prescribed in clause (2) of Schedule GG subject only to the result of an appeal preferred under clause (2) of Schedule GG by a person aggrieved, if no such appeal is filed or if such appeal is filed and dismissed no remedy by suit is available to a person like a tenant who contends that he is aggrieved by the clearance order.

Appeal by Special Leave from the Judgement and Order dated the 28th September, 1962, of the Bombay High Court in L. P. Appeal No. 84 of 1961.

M. C. Setalvad, Senior Advocate (*J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

S. V. Gupte, Additional Solicitor-General of India (*G. A. Pandya* and *M. I. Khawaja*, Advocates, with him), for Respondents Nos. 7, 8 and 9.

I. N. Shroff, Advocate, for Respondent No. 4.

The Judgment of the Court was delivered by

Mudholkar, J.—The question which falls for decision in this appeal from the judgment of the High Court of Bombay is whether the suit instituted by the plaintiffs in the City Civil Court, Bombay, was maintainable. The plaintiffs are some of the tenants occupying different rooms in a group of buildings known as Dhobi Chawls (and also known as the Colaba Land Mill Chawls) situate on Lala Nigam Road, Colaba, Bombay. There are a large number of other tenants also who reside or carry on business in these Chawls and the plaintiffs instituted a suit in a representative capacity on behalf of all the tenants. The first defendant to the suit is the Municipal Corporation of Greater Bombay and the remaining defendants 2 to 4 are landlords of the plaintiffs.

The buildings and the land on which they stand belong to the Colaba Land Mill Co. Ltd., Bombay. Under an agreement dated 16th May, 1956, called the Demolition Agreement defendants 2 to 4 undertook for a certain consideration to demolish the buildings which are admittedly in a dilapidated condition after taking the permission of the Rent Controller, Bombay. Under clause 7 of that agreement defendants 2 to 4 were to be put in possession of the buildings and land on which they stand, with leave and licence of the Company and were liable to pay Rs. 20,221-8-0 p.a. to the Company till the demolition of the buildings and thereafter they were to hold the land as tenants at will of the Company. Until the demolition of the buildings, defendants 2 to 4 were entitled to the rents payable by the tenants occupying the buildings and were liable to pay monthly taxes, insurance premia and other dues payable in respect of the buildings. After the demolition of the buildings defendants 2 to 4 were entitled to all the materials and debris but had to pay Rs. 40,000 as the price thereof to the company. Out of this amount these defendants had to pay and had actually paid Rs. 10,000 at the time of the agreement.

The plaintiff's contention is that the buildings were in a dilapidated condition for a number of years and that between August, 1951 and May, 1956 as many, as 138 notices were served on the Company for effecting repairs to the buildings but they took no action whatsoever in this regard. The plaintiffs further say that between November, 1956 and 29th January, 1960, eleven notices were served on defendants 2 to 4 for the same purpose but no action was taken by them either on those notices. Further the Company and defendants 2 to 4 were prosecuted 71 times for not complying with the notices but even these prosecutions proved ineffective. Their contention is that the Company as also defendants 2 to 4 deliberately refrained from carrying out the repairs because they wanted to demolish the buildings and in order to facilitate the attainment of this object they invited various notices issued by the Corporation and the prosecutions launched by it.

The plaintiffs admit that the Corporation, in exercise of the powers conferred by section 354-R of the Bombay Municipal Corporation Act, 1888 (hereafter referred to as the Act) have declared the area in which the buildings stand as a clearance area and under section 354-RA of that Act made a clearance order which has been duly confirmed by the State Government. According to them, however, these provisions are *ultra vires* of Article 19 (1) (f) and (g) of the Constitution. Further, according to them the first defendant has abused the provisions of the Act and that the action taken by it is *mala fide*. No particulars of *mala fides* have, however, been set out in the plaint.

The defendants denied that the aforesaid provisions are *ultra vires* and also denied that the Order was made *mala fide*. They further contended that the present suit was barred by virtue of the provisions of clause (2) of Schedule GG to the Act and was also barred by time.

The trial Court dismissed the suit mainly upon the ground that it was not tenable. An appeal was taken by the plaintiffs to the High Court which was dismissed summarily by Datar, J., on 25th August, 1961. On the same day the plaintiffs preferred an appeal under the Letters Patent which went up before a Division Bench consisting of Patel and Palekar, JJ. The learned Judges permitted the plaintiffs to amend the plaint over-ruling the objections of the defendants. In their judgment the learned Judges held that the suit was not barred. Then they proceeded to consider the question of *mala fides*. According to them the plaintiffs had pleaded *mala fides* but that they had omitted to give particulars. They also observed that it was true that no evidence was led by the plaintiffs before the trial Court and ordinarily they would not have been entitled to lead fresh evidence at that stage, much less so at the stage of the appeal under Letters Patent. According to them, however, it is not possible to dispose of the case on the material on record, that there are certain documents on record which, if unexplained, "support in a large measure the contention of the plaintiffs that defendants 2, 3 and 4 obtained an order by fraud and also that the order was *mala fide*." After referring to some of these documents they observed : "Though therefore no evidence is led on the question of *mala fides* or fraud committed upon them, it *prima facie* leads to such an inference, and it would not be proper to decide the question without requiring further evidence." This observation was followed by another which, we think, is a very unusual one. It is this : "We particularly want the Commissioner and the City Engineer and the defendants to be examined on this question." Eventually, the learned Judges remitted the case to the City Civil Court for recording additional evidence and directed that Court to certify the evidence and its findings by the end of November, 1962. After the grant of Special Leave to the appellants the proceedings before the City Civil Court have been stayed.

We must first address ourselves to the question as to whether the High Court was justified in permitting the amendment to the plaint. By that amendment the plaintiffs have added paragraph 8-A to the plaint. There they have purported to summarise the correspondence which took place between the plaintiffs and the officers of the Corporation and between the landlords and the Corporation. Then they have stated as follows :

"In the premises the plaintiffs say that the Defendants 2, 3 and 4 have fraudulently and wrongfully induced the 1st defendant to make the said order. In the alternative and in any event plaintiffs say that as defendants 2, 3 and 4 have denied their responsibility to provide accommodation to all the tenants in the new buildings intended to be constructed on the site, the plaintiffs will submit that the approval of the Improvement Committee to the said order and the subsequent confirmation thereof by the Municipal Corporation and Government was given under a mistake of fact and under circumstances not warranted by the provisions of section 354-R and of the law. In the circumstances the plaintiffs submit that the said orders passed by the 1st defendant under section 354-R have been passed in utter disregard and in violation of the strict provisions of the said section. The plaintiffs submit that the 1st defendant failed and neglected before making the said order to take any measures whether by arrangement of the programme or otherwise to ensure that as little hardship as possible was inflicted on the tenants. The plaintiffs accordingly submit that the said orders are illegal, invalid and void."

In the plaint as originally filed, in paragraph 9 they have said the following on the question of *mala fides* :

"The plaintiffs submit that the action sought to be taken is a clear abuse of the provisions of the Bombay Municipal Corporation Act and as such *ultra vires* the powers conferred upon the defendant No. 1 by the said Act. The plaintiffs, therefore submit that the action of the defendant No. 1 is *mala fide*."

In the earlier paragraph the plaintiffs have challenged the validity of section 354-R, and 354-RA on the grounds that they confer untrammelled and uncontrolled executive discretion upon the Corporation and its officers and also upon the ground that they are violative of the plaintiff's right under Article 19 (1) (f) and (g) of the Constitution. They have not indicated why the making of the clearance order by the Corporation was an abuse of the provisions of the Act. No doubt, later in paragraph 9 they say that the Corporation failed to give a hearing to the plaintiffs and that had they been given an opportunity they would have satisfied the Corporation that the premises in question did not require to be pulled down. While therefore, it is true that the plaintiffs have characterised the action of the Corporation as "*mala fide*" the grounds upon which the action is characterised as *mala fide* appear to be (a) the unconstitutionality of the provisions of section 354-R and 354-RA and (b) failure of the Corporation to give an opportunity to the plaintiffs to satisfy its officers that the premises did not require to be demolished. By the amendment made by them in pursuance of the order of the High Court they have shifted their ground by saying that the landlords have fraudulently and wrongfully induced the Corporation to make the order and plead alternatively that as the landlords have denied their responsibility to provide accommodation to all the tenants in the new building intended to be constructed on the site, a clearance order could not properly be made by the Corporation.

It was urged before us by Mr. Setalvad that an entirely new case has been made out in the amendment and that the plaintiffs did so at the suggestion of the Court. In support of his contention he also referred to the objection of Mr. S. V. Gupte before the High Court to the effect that the plaintiff's had not made an application for the amendment of the plaint. He further, relying upon a reference in the judgment, said that the amendment proposed by the plaintiffs was not found by the Court to be adequate and that it was at the instance of the Court that the plaintiffs proposed the amendment which now actually finds place as paragraph 8-A of the plaint. There appears to be good foundation for what Mr. Setalvad says but merely because an amendment was sought by the plaintiffs at the suggestion of the Court it would not be proper for us to disallow it unless there are grounds for holding that it was forced upon an unwilling party. That is, however, not the suggestion. For, the Court wanting to do justice may invite the attention of the parties to defects in pleadings so that they could be remedied and the real issue between the parties tried. There is, however, another ground and a stronger one which impels us to hold that the amendment should never have been allowed. That ground is that the plaintiffs are now making out a case of fraud for which there is not the slightest basis in the plaint as it originally stood. The mere use of the word *mala fide* in the plaint cannot afford any basis for permitting an amendment. The context in which the word *mala fide* is used in the plaint clearly shows that what the plaintiffs meant was that the order of the Corporation having been made in exercise of arbitrary powers and having the result of adversely affecting the plaintiff's right

under Article 19 (1) (f) and (g) of the Constitution amounted to an abuse of the provisions of the Act and was thus made *mala fide*.

The High Court was quite alive to the requirement of law that a party should not be allowed to make out a new case by way of an amendment to the pleading. Dealing with this matter the High Court has observed :

“This brings us to the course which we must adopt in the present case and the amendment application. In the plaint, the plaintiff alleged that the order was *mala fide* and that it was obtained for collateral purposes.”

The learned Judges were not correct in observing that it was the plaintiff's case in the plaint that the landlords had obtained the clearance order or that the Corporation had made order for a collateral purpose. This impression of the High Court seems to be the basis, of the rather curious procedure which it chose to follow in this case. Then the High Court referred to the fact that no evidence whatsoever had been led by the plaintiffs before the City Civil Court to the effect that the order was passed fraudulently or for a collateral purpose. It was alive to the fact that in such a case a party should not be allowed to adduce fresh evidence at the appellate stage and much less so at the stage of Letters Patent Appeal. Then it observed :

“If the case had rested thus the matter would have been very simple apart from the amendment application. It seems to us however that it is not possible to dispose of this case satisfactorily on the material on record. There are some documents on record which if unexplained support in a large measure the contention of the plaintiffs that defendants 2, 3 and 4 obtained the order by fraud and also that the order was *mala fide*.”

If the High Court, in making these observations, was referring to the provisions of Order 41, rule 27, Code of Civil Procedure it ought not to have overlooked the mandatory provisions of clause (b) of sub-rule (1) of rule 27. No doubt, under rule 17 the High Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. The High Court does not say that there is any such lacuna in this case. On the other hand what it says is that certain documentary evidence on record supports “in a large measure” the plaintiff's contention about fraud and *mala fides*. We shall deal with these documents presently but before that we must point out that the power under clause (b) of sub-rule (1) of rule 27 cannot be exercised for adding to the evidence already on record except upon one of the grounds specified in the provision. If the documents on record are relevant on the issue of fraud the Court could well proceed to consider them and decide the issue. The observations of the High Court that certain documents would support the plaintiff's contention of fraud only if they were not explained would show that according to it they furnish a *prima facie* evidence of fraud. There is nothing to show that the defendants or any of them wanted to be afforded an opportunity for explaining the documents. It would further appear that it was not merely for the limited purpose of affording the defendants an opportunity to explain the documents that the High Court remitted the case to the City Civil Court. For, in the concluding portion of its judgment the High Court has directed as follows :

“In the result, we remit the case to the City Civil Court for receiving additional evidence as directed by us in the judgment and also to allow evidence on the amendment. We direct that the defendants do file their written statement within three weeks from today, or at such earlier time as they can in answer to the amendment permitted to be made. Discovery and inspection forthwith within a week thereafter. And after this formality is over, the case to be on the Board for final hearing for taking evidence on the issue of *mala fide* and the issues that arise on the amended pleadings between the parties.....”

This clearly shows that what the High Court has in substance done is to order a fresh trial. Such a course is not permissible under Order 41, rule 27, Code of Civil

Procedure. The High Court has quite clearly not proceeded under Order 41, rule 25, because it has not come to the conclusion that the City Civil Court had omitted to frame or try an issue or to determine the question of fact which was essential to the right decision of a suit. For, the High Court has not indicated which issue was not tried by the trial Court. If the High Court meant that the necessary issue had not been raised by the trial Court though such issue was called for in the light of the pleadings, the High Court is required under this rule to frame the additional issue and then remit it for trial to the City Civil Court. Finally, this is not a case which was decided by the trial Court on any preliminary point and, therefore, a general remand such as is permissible under rule 23 could not be ordered.

The only documents to which the High Court has referred to in its judgment as supporting the plaintiffs' allegations of fraud and *mala fides* are the letter dated 3rd September, 1959, which the City Engineer wrote to the Tenant's Association and the letter dated 11th September, 1959, which the Commissioner wrote to the Improvements Committee. In the first of these letters the City Engineer had stated that the landlords had agreed to construct a building consisting of single room tenement for the purpose of letting out at standard rents and that the landlords were taking the responsibility for providing either alternative accommodation to *bona fide* residents by shifting them temporarily to other premises or by arranging a phased programme of demolition and construction as may be found convenient. How this letter can afford any evidence of fraud or *mala fides* it is difficult to appreciate. It is not disputed before us that the landlords had constructed some chawls at Kurla and that they had offered to house the tenants of the Dhobi Chawls in the Kurla Chawls temporarily. It was also not disputed that the landlords had agreed to construct, after the demolition work was over, new buildings in which the present tenants would be afforded accommodation at standard rents. Paragraph 3 of the letter of 11th September, 1959, quoted by the High Court in its judgment mentions that a representation was received from the tenants to the effect that the landlord should construct a new structure near about the clearance area instead of asking the tenants to go to the Kurla Chawls. But their demand cannot be regarded as reasonable. The landlords are not shown to own any land in the neighbourhood. The correspondence through which we were taken by Mr. Setalvad abundantly shows that land values are very high in Colaba and range between Rs. 250 and Rs. 275 per sq.ft. and the landlords could not be reasonably expected to buy land for the purpose. Moreover, there is nothing to show that any vacant building site was available in the neighbourhood of Dhobi Chawls at the relevant time.

The High Court observed in its judgment that it was only after the scheme was finally approved by the Corporation, confirmed by the State Government and the final orders made by the City Civil Court became operative that the City Engineer wrote to the Tenants' Association stating that no undertaking was given by the landlord. The High Court had apparently in mind the letter dated 1st April, 1960, sent by the City Engineer to the Tenants' Association which is described in the paper books as item No. 38. That letter reads thus :

"Gentlemen,

Reference : Your letter No. 11, dated 19th February, 1960. The landlord of the abovementioned property has undertaken the responsibility of providing alternative accommodation to *bona fide* residential tenants at standard rent by constructing a building on one of the plots viz., plot No. 7 at the same site. The question of making the site available for the construction of the said building, either by the tenants shifting temporarily to other place or by the landlord arranging a phased programme of demolition and construction, is a matter which should be mutually arranged by the landlords and the tenants. The Municipality would facilitate towards arriving at any such arrangement between the two parties as indicated by you, no undertaking has been obtained by the Municipality from the landlord for any phased programme of demolition of the Chawls. The landlord will be required to demolish the chawls in compliance with the Clearance Order after the same becomes operative.

As there is no sufficient open space available at the above property, it does not seem feasible to provide temporary accommodation for the tenants at the same site. If the tenants are not in a position to make their own arrangement to shift from the place, they should temporarily shift to tenements at Kurla offered to them by the landlord with a view to facilitate speedy construction of the proposed building.

Yours faithfully,
Sd./_____”.

This letter, far from showing that either the Corporation or the landlords had gone back on the assurance of providing the tenants alternative accommodation, reaffirms it. No doubt it says that no undertaking was obtained by the municipality from the landlords to the effect that a phased programme of demolition of the chawls would be followed. This, the City Engineer pointed out, was a matter of negotiation between the landlords, on the one hand and the tenants on the other. Having made alternative arrangements for housing the tenants temporarily there was no further responsibility either on the Corporation or on the landlords to do anything more. The High Court, however, thought otherwise and observed : “ Though therefore no evidence is led on the question of *mala fides* or fraud it *prima facie* leads to such an inference and it is not proper to decide the question without further evidence.” It will be repeating ourselves to say that in these circumstances the High Court had no powers to admit additional evidence or to direct additional evidence being taken.

Mr. Shroff who appears for the plaintiffs has referred us to two reports of architects in which the architects have stated that repairs to the buildings would cost Rs. 2 lacs whereas new buildings would cost Rs. 3 lacs and that, therefore, the best thing for the landlords to do was to approach the Corporation for making a clearance order so that they could eventually construct new buildings on the site. According to learned Counsel this circumstance, taken with the fact that there was deliberate avoidance by the landlords and the owners of the Colaba Land Mill Co. Ltd., to comply with the notice of the Corporation to undertake repairs, goes to show collusion between the landlords and the Corporation and that, therefore, it cannot be said that there was no material on record in support of the plea of fraud set out in paragraph 8-A. Apart from the fact that the High Court has not referred to this material it is sufficient to observe that though the landlords may have deliberately allowed the buildings to become unfit for human occupation or a danger to the safety of the tenants occupying them, these matters do not indicate any collusion between the landlords and the Corporation.

We are, therefore, of the view that the High Court was in error in allowing the amendment to the plaint and in remitting the suit to the trial Court for a virtual retrial. The High Court, however, did not rest content with this order but further directed “ we particularly want the Commissioner and the City Engineer and the defendants to be examined on this question ”—the question being the breach of an assurance given to the tenants. In making this direction the High Court may have been actuated by a laudable motive but we think it ought to have borne in mind the limits which the law places upon the powers of the Court in dealing with a case before it. Just as it is not open to a Court to compel a party to make a particular kind of pleading or to amend his pleading so also it is beyond its competence to virtually oblige a party to examine any particular witness. No doubt, what the High Court has said is not in terms a peremptory order but the parties could possibly not take the risk of treating it otherwise. While, therefore, it is the duty of a Court of law not only to do justice but to ensure that justice is done it should bear in mind that it must act only according to law, not otherwise.

The question then is whether we should send back the matter to the High Court deciding the question of the vires of sections 354-R and 354-RA. It will be remembered that the High Court has not given a finding on this point. We would ordinarily have sent back the case to the High Court for deciding the point. But bearing in mind the fact that the clearance order was made by the Corporation as long ago as 7th May, 1959 and confirmed by the State Government on 23rd

January, 1960 and also the possibility of the appeal not being dealt with within a reasonable time by the High Court on account of the congestion of work there, we thought it appropriate to hear the parties on this point as well and to decide it ourselves.

The contention of Mr. Shroff is briefly this. The plaintiffs and those who are occupying the buildings have an interest in them by reason of the fact that they are tenants. As a result of the clearance order they are liable to be evicted from their respective tenements. Therefore, he contends, the Corporation could not make such an order without giving them an opportunity of showing cause against it. According to him, the provisions of sections 354-R and 354-RA do not contemplate an opportunity to be given to the tenants before a clearance order is passed and, therefore, the provisions are *ultra vires*. Further, according to him, their suit is not barred by virtue of the provisions of clause (2) of Schedule GG, because they cannot be said to be "persons aggrieved" by the clearance order. They therefore, did not have a right to prefer an appeal before a Judge of the City Civil Court, Bombay from that order. He also points out that the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 has placed restrictions on the right of a landlord of a house situated in an area like the City of Bombay to which the Act extends, to evict a tenant therefrom by enacting in section 12 that a tenant shall not ordinarily be evicted as long as he pays the standard rent and permitted increases, whatever may have been the duration of his tenancy, under the original agreement. A right conferred by this provision on the tenant exists independently of the landlord's right to own and possess property and this right could not be interfered with or derogated from by the Corporation by making a clearance order behind the back of the tenant. He admits that under clause (hh) of sub-section (1) of section 13 a landlord will be entitled to recover possession of the premises from the tenant on the ground that they are required by a local authority or other competent authority. But, he argues, this provision furnishes another reason for the tenant being afforded an opportunity by the Act to show cause against a proposed clearance scheme which affects or is likely to affect him inasmuch as he will be bound by the clearance order in a proceeding undertaken by the landlord under section 13 (1) of the Act for recovery of possession of the demised premises on the strength of that order.

We have no doubt that a tenant has both under the Transfer of Property Act and under section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 an interest in the demised premises which squarely falls within the expression 'property' occurring in sub-clause (f) of clause (1) of Article 19 of the Constitution. The right which a tenant enjoys under this sub-clause is, however, subject to the provisions of clause (5) of Article 19 which, among other things, provides that the right recognised by the sub-clause does not affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses in the interests of the general public. The Bombay Municipal Corporation Act was admittedly an existing law at the date of the commencement of the Constitution but sections 354-R to 354-RA were substituted for the earlier provisions by section 18 of Bombay Act XXXIV of 1954. So what we have to ascertain is whether the law as it stands imposes a reasonable restriction on the tenant's right to hold the demised premises. For this purpose we will have to examine the provisions of the Act which empower the Corporation to make a clearance order.

Sub-section (1) of section 354-R provides that if it shall appear to the Commissioner, among other things, (a) that residential buildings in any area are by reason of disrepair unfit for human habitation or for like reason dangerous or injurious to the health of the inhabitants of the area and (b) that the conditions in the area can be effectually remedied by the demolition of all the buildings in the area without making an improvement scheme, the Commissioner can define the area and submit a draft clearance scheme for the approval of the Corporation. The Corporation can then pass a resolution declaring that the area as defined and approved by it to be

clearance area. Sub-section (2) provides, among other things, that the Corporation should ascertain the number of persons who are likely to be dishoused in such area and thereafter take such measures as are practicable to ensure that as little hardship as possible is inflicted on those dishoused. The resolution is then required to be forwarded to the State Government.

Sub-section (4) provides as follows :

"As soon as may be after the Corporation have declared any area to be a clearance area, the Commissioner shall, in accordance with the appropriate provisions hereafter contained in this Act proceed to secure the clearance of the area in one or other of the following ways, or partly in one of those ways, and partly in the other of them, that is to say—

(a) by ordering the demolition of the buildings in the area ; or

(b) by acquiring on behalf of the Corporation land comprised in the area and undertaking or otherwise securing, the demolition of the buildings thereon."

Sub-section (1) of section 354-RA requires the Corporation to submit the clearance order to the State Government for confirmation. Sub-section (4) reads thus :

"Before submitting the order to the State Government, the Commissioner shall—

(a) publish simultaneously in the Official Gazette and in three or more newspapers circulating within Greater Bombay, a notice stating the fact of such a clearance order having been made and describing the area comprised therein and naming a place where a copy of the order and of the plan referred to therein may be seen at all reasonable hours ; and

(b) serve on every person whose name appears in the Commissioner's assessment book as primarily liable for payment of property tax leviable under this Act, on any building included in the area to which the clearance order relates and, in so far as it is reasonably practicable to ascertain such persons, on every mortgagee thereof, a notice stating the effect of the clearance order and that it is about to be submitted to the State Government for confirmation, and specifying the time within and the manner in which objections thereto can be made to the Commissioner."

Under sub-section (5) objections, if any, received by the Commissioner are to be submitted to the Improvements Committee and that Committee is entitled under sub-section (6) to make such modifications in respect of the order as it may think fit. The matter is then to go to the Corporation and thereafter to the State Government. Sub-section (7) provides that the provisions of Schedule GG to the Act shall have effect with respect to the validity and date of operation of a clearance order. We are not concerned with the rest of the provisions of section 354-RA. Clause (1) of Schedule GG provides that as soon as the clearance order is confirmed by the State Government the Commissioner has to publish, in the same manner as a notice under sub-section (4) of section 354-RA, a notice stating that the order has been confirmed. Clause (2) is important and we would reproduce it. It runs thus :

"Any person aggrieved by such an order as aforesaid, or by the State Government's approval of a re-development plan or of a new plan may, within six weeks after the publication of notice of confirmation of the order, or of the approval of the plan, prefer an appeal to a Judge of the City Civil Court, Bombay, whose decision shall be final."

It is contended on behalf of the Corporation by Mr. Setalvad and also on behalf of the landlords by the Solicitor-General that a tenant is entitled to raise an objection to the making of a clearance order not only under clause (b) of sub-section (4) of section 354-RA but also in his appeal under clause (2) of Schedule GG. It is no doubt true that there is no express mention of tenants in either of these provisions but from the fact that clause (a) of sub-section (4) of section 354-RA requires the publication of the clearance order it would be reasonable to infer that the object of doing so is to invite objections at the instance of persons who would be affected by the order. Since tenants would be affected by it, they fall in this class. It is true that clause (b) of that provision contemplates actual service of notice only on the persons primarily liable to pay property tax and on the mortgagees of the property but not on others and also says that the time within and the manner in which objections to the order could be made to the Commissioner should also be specified but it does not say anything regarding the tenants. But if because of this we were to hold that it would not be open to a tenant or any other person who would be affected by the order, to lodge an objection to the proposed order it would be making the publication of notice practically meaningless. Undoubtedly tenants are persons who would be affected:

by the order. Sub-section (2) of section 354-R casts certain duties upon the Corporation with respect to the persons who are likely to be dishoused in consequence of the clearance order. It would, therefore, be legitimate to infer that a corresponding right was conferred upon the tenants to secure the performance of its duties towards them by the Corporation. This right would be in addition to their interest in the property itself. They must, therefore, be held to be persons who are entitled to lodge an objection to the proposed order. Mr. Shroff, however, contends that clause (b) of sub-section (4) of section 354-RA confines the right to lodge an objection only to the persons specified in that clause and that there is nothing in the language of clause (a) from which a similar right can be deduced in favour of other persons. It seems to us that in order to give full effect to the provisions of both clauses (a) and (b) of sub-section (4) the words "and specifying the time within and manner in which objections thereto can be made to the Commissioner" occurring at the end of clause (b) should be read as governing not only the rest of clause (b) but also clause (a). We would not be re-writing the section if we did so because if the object of the Legislature was to give a right to lodge objections only to the persons specified in clause (4) (b), sub-section (5) would not have said that the Commissioner shall submit to the Improvements Committee the objections received under sub-section (4), but would have said instead "objections received under clause (b) of sub-section (4)"

That a right has been conferred upon a tenant to lodge an objection is made further clear by the provisions of clause (2) of Schedule GG which we have earlier reproduced. The expression "any person aggrieved" is sufficiently wide to include not only a tenant but also an occupant of a building who is likely to be dishoused as a result of the action taken under a clearance order. The expression "person aggrieved" has not been defined in the Act and, therefore, we are entitled to give it its natural meaning. The natural meaning would certainly include a person whose interest is in any manner affected by the order. We are supported in this by the observations of James, L.J., in *Ex parte Sidebotham*. In *re Sidebotham*¹. A similar expression occurring in section 24 (1) of the Administration of Evacuee Property Act, 1950 was the subject of construction in *Sharifuddin v. R.P. Singh*². The learned Judges there held that these words are of the widest amplitude and are wide enough to include an Assistant Custodian of Evacuee Properties.

Since the right conferred by clause (2) of Schedule GG upon an aggrieved person is a right to prefer an appeal against a clearance order, as confirmed by the Government, before a Judge of the City Civil Court, Mr. Shroff contends that the words "aggrieved person" therein must necessarily mean a person who was a party to the order. It is true that ordinarily a right of appeal is conferred on a person who is a party to the proceeding but that would be so only where the proceeding is between certain parties. A proceeding of the nature contemplated by section 354-R is not, strictly speaking, a proceeding between the parties ranged on opposite sides. What is contemplated is the exercise of certain powers by the Corporation which will affect the interests of a variety of persons or a class or classes of persons and clause (2) of Schedule GG gives a right to any of them to prefer an appeal if his legal right or interest is affected by any action of the Corporation taken in pursuance of its powers.

Upon a reasonable construction of section 354-RA and Schedule GG it must therefore, be held that they afford opportunities to tenants to object to the clearance order. It follows from this that the restrictions on the tenants' right to hold property enacted by sections 354-R and 354-RA are not unreasonable and that the provisions are valid. Mr. Shroff agrees that if the restrictions are reasonable his contention that these provisions are unconstitutional must fail.

Upon the view then that these provisions are valid it must further follow that it was open to the plaintiffs to prefer an appeal before a Judge of the Civil Court. Finally it is given to a clearance order after its confirmation by the Government and its

1. (1880) L.R. 14 Ch D. 458 at p 465.

2. A I.R. 1957 Pat. 235.

publication in the manner prescribed in clause (2) of Schedule GG subject only to the result of an appeal preferred under clause (2) of Schedule GG by a person aggrieved. If no such appeal is preferred or if such appeal is filed and dismissed no remedy by suit is available to a person like a tenant who contends that he is aggrieved. Agreeing with the learned City Civil Court Judge we hold that the plaintiff's suit was not maintainable.

Accordingly we set aside the judgment of the High Court and allow this appeal. We, however, make no order as to costs.

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. Hidayatullah, J. C. SHAH AND R. S. BACHAWAT, JJ.

Jashwantraï Malukchand

.. Appellant*

v.

Anandilal Bapalal

.. Respondent.

Bombay Rents, Hotel and Lodging House Rates Control Act (LVII of 1947), sections 12 (3) (a) and (b)—Standard rent in dispute—Section 12 (3) (a) not applicable—Standard rent fixed by Small Causes Court not accepted by parties—Both parties filing revision against the order—Suit for eviction during pendency of revisions—If governed by clause (a), or, (b) of section 12 (3).

One of the conditions to be fulfilled in order that section 12 (3) (a) of the Bombay Rents, Hotel and Lodging House Rates Control Act (LVII of 1947) may be applicable to a case is that there should be no dispute regarding the amount of standard rent. Section 12 (3) (b) comprehends all cases other than those falling within section 12 (3) (a) and a case in which there is a dispute about the standard rent must obviously fall not in clause (a) but in clause (b) of section 12 (3).

Where the standard rent fixed by the Court of Small Causes on an application by the tenant is not accepted by the parties but questioned by both the landlord and the tenant and each files a revision against the order in the District Court, it cannot be said that after the fixation of the standard rent by the Small Causes Court no dispute regarding standard rent remained. In such a case a suit for eviction of the tenant filed during the pendency of the revision petitions on the ground of arrears of rent would be governed by clause (b) and not by clause (a) of section 12 (3) of the Bombay Rents, Hotel and Lodging House Rates Control Act (LVII of 1947).

Appeal by Special Leave from the Judgment and Order dated 24th October, 1961/16th January, 1962 of the Gujarat High Court in Civil Revision Application No. 431 of 1960.

S. T. Desai, Senior Advocate (*J. B. Dadachanji, O. C. Mathur and Ravinder Naram, Advocates of M/s. J. B. Dadachanji & Co., with him*), for Appellant.

Ganpat Rai, Advocate, for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—Jashwantraï Malukchand who appeals by Special Leave against the judgment of the High Court of Gujarat dated 24th October, 1961, was a tenant of a shop belonging to Anandilal Bapalal, respondent. By the judgment now under appeal the High Court reversed the concurrent decision of the two Courts below and ordered eviction of the appellant from the shop on the ground that he was in arrears for a period of six months in the payment of the rent. By a supplementary order dated 16th January, 1962, mesne profits were also granted to the landlord till delivery of possession of the shop. The High Court has differed from the two Courts below in the application of the third sub-section of section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, by which sub-section the present proceedings were governed. The High Court held that clause (a) of the sub-section applied while the Courts below applied clause (b). Before we read the section the facts necessary to understand this difference in the two points of view may be stated.

The tenant rented the shop from 1st April, 1954 and executed a rent note for Rs. 155 p.m. From 1st February, 1955, he did not pay the rent and when the landlord demanded it the tenant filed a suit for fixation of standard rent. During the pendency of those proceedings, the Court of Small Causes, Ahmedabad, acting under section 11 (3) of the Act (to which reference is unnecessary) fixed Rs. 80 p.m. as provisional standard rent and the tenant paid Rs. 1,600 by instalments for the period for which he was then in arrears. On 9th November, 1956, the Court passed a final order fixing Rs. 125 p.m. as the standard rent. Both sides filed revisions against that order in the District Court and they were dismissed after contest on 25th March, 1958. It appears that the landlord filed a further revision in the High Court but it is not known from the record when and how it was dismissed. After the order was passed on 9th November, 1956, the landlord demanded Rs. 1,385 as the balance of the rent due to him at the new rate till the end of January, 1957 and sent a registered notice but the tenant did not pay. On 4th March, 1957, the landlord filed the suit from which this appeal arises contending that the tenant was in arrears for six months and had not paid the arrears within one month of the notice. This suit terminated in favour of the tenant on 28th April, 1958, because by then the back rent calculated at Rs. 125 p.m. and the costs of the suit were fully paid by the tenant. The landlord appealed to the Assistant Judge, Ahmedabad, claiming that after the standard rent was fixed finally on 9th November, 1956, the case fell to be governed by clause (a) of section 12 (3) of the Act and as the tenant was in arrears for a period of six months he ought to have been evicted. The appeal was not accepted. The Assistant Judge held that the tenant was protected by clause (b) of section 12 (3) of the Act. On Revision before the High Court under section 115 of the Code of Civil Procedure the decision was reversed as in the opinion of the High Court clause (a) of the third sub-section applied to the facts of the case.

Section 12 of the Act, in so far as it is material, may now be read :

" 12. (1) A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act.

(2) * * * * *

(3) (a) Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court shall pass a decree for eviction in any such suit for recovery of possession.

(b) In any other case, no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and thereafter continues to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also pays cost of the suit as directed by the Court

(4) * * * * *

Explanation 1 —In any case where there is a dispute as to the amount of standard rent or permitted increases recoverable under this Act the tenant shall be deemed to be ready and willing to pay such amount if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (3) of section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the Court.

Explanation 2. * * * * *

Mr S. T. Desai submits on behalf of the appellant that the High Court could not act under section 115 of the Code of Civil Procedure when no question of jurisdiction was involved and he refers to *Vora Abbasbhai Alimahomed v. Haji Gulamnabi Haji Safibhai*¹. He argues in the alternative that as the tenant paid the provisional standard rent and discharged all arrears of standard rent and costs before the suit was decided he could not be evicted under clause (a) of the third sub-section and he relies on the same ruling. Mr. Ganpatrai on the side of the landlord submits that after the decision of the Court fixing Rs. 125 p.m. as standard rent, no dispute regarding the

amount of standard rent remained and as rent was payable by the month and the tenant was in arrears for six months and did not pay the arrears of standard rent so fixed within one month of the notice to him, the Court was bound to pass a decree of eviction under clause (a). This is how the High Court also viewed the matter. He relies upon *Vasumatiben Gawishankar Bhatt v. Naviram Manchharam Vora and others*¹.

The decision referred to by Mr. Ganpatrai has no application here. In our opinion, it is unnecessary to decide the first of Mr. Desai's contentions because his appeal can be disposed of on a consideration of the rival contentions on the second point. We are concerned with the two clauses (a) and (b) of section 12 (3). Eviction under clause (a) is made to depend upon several conditions which must coexist and which find adequate enumeration in our summary of Mr. Ganpatrai's argument. One such condition is that there should be no dispute regarding the amount of standard rent. Clause (b) comprehends all cases other than those falling within clause (a) and a case in which there is a dispute about the standard rent must obviously fall not in clause (a) but in clause (b). There was here a dispute about standard rent. The tenant had already made an application for fixation of standard rent, paid the arrears of provisional standard rent and complied with the requirements of clause (b). He was therefore protected.

The contention of Mr. Ganpatrai that the dispute regarding the standard rent came to an end on 9th November, 1956 when the Court fixed Rs. 125 p.m as the standard rent would be correct if the parties accepted the determination. But neither side did. Each side questioned the amount by filing a revision in the District Court. It is particularly strange for the landlord to claim that there was no dispute subsisting when he himself filed one revision after another to get the amount increased. Since the dispute continued, the case was not governed by clause (a) but by clause (b) and the High Court was in error in applying the former clause and reversing the decisions based on the latter.

The appeal will be allowed and the judgment of the High Court will be set aside and that of the Assistant Judge, Ahmedabad, will be restored. The respondent will bear the costs throughout.

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Ram Charan Das

.. *Appellant**

v.

Girja Nandini Devi and others

.. *Respondents.*

Family settlement—Essentials and effect—Family settlement, if alienation or transfer or creation of interest in property—Family settlement in respect of estate under management of Court of Wards—U.P. Court of Wards Act, (IV of 1912, section 37 (a)—If attracted.

Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family. The word "family" in the context is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. The consideration for such a settlement is the expectation that such a settlement will result in establishing or ensuring amity and goodwill amongst persons bearing relationship with one another. That consideration having passed by each of the disputants the settlement consisting of recognition of the right asserted by each other cannot be permitted to be impeached thereafter. Further where one of the parties has paid monies to the Court of Wards for obtaining release from its management of the properties which were allotted to him, the rule of estoppel would apply against the other party who has taken benefit under the settlement and operate as a bar to any *lis* questioning the capacity of the other parties to enter into the transaction.

A compromise of litigation by way of family settlement is in no sense an alienation, by a limited owner and does not amount to a transfer or creation of an interest in property under the management of Court of Wards and section 37 (a) of the U.P. Court of Wards Act does not apply to the transaction.

Apart from that the Court of Wards was a party to the concerned suits which were settled by the family settlement

Appeal by Special Leave from the Judgment and Order dated 23rd September, 1958 of the Allahabad High Court in First Appeal No. 392 of 1944.

S. P. Sinha, Senior Advocate, (*E. C. Agarwala*, *S. Shaukat Hussain* and *P. C. Agrawala*, Advocates, with him), for Appellant.

Niren De, Additional Solicitor-General of India (*Togeshwar Prasad* and *A. N. Goyal*, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Mudholkar, J—The substantial question which falls for decision in this appeal is as to the legal effect of a deed, Exhibit Y-13, dated 31st March, 1933, described in the paper-book as a deed of partition. A subsidiary question also arises for consideration which is, whether the validity of the transaction evidenced by the deed is affected by reason of the fact that the property comprised therein was at the time of its execution, under the management of the Court of Wards. According to the plaintiff the deed was invalid and did not affect his right to a share in the property in the suit. His contention failed both in the trial Court as well as in the High Court.

The property covered by the deed belonged to one Kanhaiyalal who died on 10th June, 1922, without leaving a widow or any issue. This property, along with some other property originally belonged to Kanhaiyalal's grandfather Chunnilal. It is said by some of the parties that by a will executed by him in the year 1883 he devised his property in favour of Kanhaiyalal and his brother Madho Prasad. Madho Prasad died during the life-time of Kanhaiyalal, leaving a daughter Maheshwari Bibi. After Madho Prasad's death Kanhaiyalal entered into possession of the property which had been bequeathed to Madho Prasad by Chunnilal. After Kanhaiyalal's death Kadma Kuar, his mother, entered into possession of the entire property which was in the possession of Kanhaiyalal till his death. Kadma Kuar died on 14th October, 1937 and shortly thereafter the suit out of which this appeal arises was instituted by Ram Charan Das, the appellant. It may be mentioned that Kanhaiyalal and Madho Prasad had a sister by name Mst. Pyari Bibi. She had a son named Gopinath who died in the year 1934 leaving a widow, Girja Nandini, the first defendant to the suit. The plaintiff is the sixth son of Diwan Madan Gopal. Diwan Madan Gopal was one of the two sons of Brijlal and Brijlal was the only son of Deoki Nandan. Deoki Nandan himself was the elder brother of Chunnilal. The plaintiff who is the appellant before us is thus a collateral of Kanhaiyalal. It is not disputed that he and his brothers were the next reversioners entitled to succeed to Kanhaiyalal's property after the death of his mother Kadma Kuar. To this suit he joined Girja Nandini Devi, widow of Gopinath as defendant No. 1 and it is she who is the contesting respondent before us.

Soon after Kadma Kuar entered into possession of the estate of Kanhaiyalal, she applied to the appropriate authority for taking over possession and management of the property which was in the possession of Kanhaiyalal at the time of his death whereupon the Court of Wards took over its management under section 10 of the U.P. Court of Wards Act, 1912 (IV of 1912). This property consisted not only the property which Kanhaiyalal had obtained under the will of Chunnilal but also of the property which had been bequeathed in that will to Madho Prasad and of which Kanhaiyalal had obtained possession during his life-time. Maheshwari Bibi, the daughter of Madho Prasad laid a claim to the property which had been bequeathed by Chunnilal on the ground that the two brothers who took these properties under Chunnilal's will took them not as joint tenants but as tenants in common. The claim made by her in this respect was examined by the Court of

Wards and upon Kadma Kuar agreeing, the Court of Wards released half of the estate under its management, that is, the share in the property which is said to have been bequeathed to Madho Prasad.

It is necessary to refer to three suits which came to be instituted during the life-time of Kadma Kuar, the first of which is 30 of 1932. This was instituted by Gopinath who claimed to be the next reversioner upon the ground that he being the sister's son of Kanhaiyalal, had become an heir preferential to the present appellant and his brothers because of the passing of the Hindu Law of Inheritance (Amendment) Act of 1929. To this suit Maheshwari Bibi and Kadma Kuar and the Court of Wards were made defendants. He sought therein a declaration to the effect that the Court of Wards had no right to release half the property in favour of Maheshwari Bibi. This suit, however, was eventually withdrawn. Two other suits, Suit Nos. 53 of 1932 and 54 of 1938, came to be filed shortly thereafter. In the first of these the present plaintiff was himself the plaintiff while in the second, his brother Hanuman Prasad (defendant No. 6 in the present suit) was the plaintiff. Both of them claimed to be the nearest reversioners upon the ground that the Act of 1929 did not affect their right to the properties left by Kanhaiyalal. Each of them sought a declaration that Maheshwari Bibi and Gopinath had no right of any kind in respect of these properties. These suits were founded on the ground among others that Maheshwari Bibi had no right because Chunnilal could not by his will devise the property to her father Madho Prasad and Gopinath had none because he was not in fact Kanhaiyalal's sister's son. Gopinath, Maheshwari Bibi, Kadma Kuar and the Court of Wards, were made parties to these suits. It is common ground that the claims in both these suits were compromised. Under one of the compromises the dispute with Maheshwari Bibi was settled and we are no longer concerned with that matter. Under the other compromise the dispute with Gopinath and Kadma Kuar was settled. Decrees were drawn up in these suits embodying the terms of each of the compromises arrived at amongst the parties. The latter compromise was entered into in Suit No. 53 of 1932 and its date was 31st March, 1933. The document, Exhibit Y-13 embodies the terms of the compromise in Suit No. 53 of 1932. To that document, amongst others, the appellant, Gopinath and Kadma Kuar were parties.

According to the plaintiff the compromise in question was not in law a surrender nor a family arrangement and that in any case Kadma Kuar was not entitled to make a family settlement and that what she did does not amount in law to a surrender. Also according to him Kadma Kuar was a person under disability being at the relevant time a ward under the Court of Wards and, therefore, the transaction was void.

On behalf of the contesting defendant it was urged in the Courts below that the transaction amounted to surrender of her estate by Kadma Kuar and alternatively that it was a family settlement to which the plaintiff was one of the parties and, therefore, he is estopped from challenging the validity of the compromise, particularly so as he has taken benefit thereunder and also because in view of the compromise Gopinath had discharged the debts of Kanhaiyalal which at law were recoverable from the property in question. Alternatively the defendants contended that the transaction evidenced by the document was an effective surrender by Kadma Kuar in favour of Gopinath who was the presumptive reversioner at that time.

At this stage it is desirable to point out that out of the properties described in List A of the Schedule to the plaint the plaintiff-appellant lays no claim to items 1 and 2 which are respectively described as properties at Hewett Road, Allahabad, and Goshain Tola, Allahabad nor to item 7 (i) described as 8-anna share in a Zamindari village. Such a concession was made before this Court by Mr. S. P. Sinha, Counsel for the appellant, when the matter was argued before this Court on 14th April, 1964, when the hearing was adjourned to enable the parties to arrive at a settlement. No settlement was arrived at and the matter was re-argued before

this Court on 8th and 9th March, 1965. Mr. Sinha has not withdrawn the concession made by him on the earlier occasion. We may also make a mention of the fact that Mr. Niren De, the Additional Solicitor-General has not argued that Exhibit Y-13 purports to show that Kadma Kuar surrendered the widow's estate. In the circumstances we propose to confine ourselves to the consideration of only one matter and that is whether the deed (Exhibit Y-13) is a family arrangement and as such binding upon the plaintiff.

It seems to us abundantly clear that this document was in substance a family arrangement and, therefore, was binding on all the parties to it. Moreover it was acted upon by them. For, under certain terms thereof one of the parties, Gopinath, paid off certain liabilities to which the property which was allotted to his share was subjected. According to Mr. Sinha, however, the transaction evidenced by the document was not a family settlement but only a surrender by Kadma Kuar though in law it could not operate as a surrender firstly, because it was not of the entire estate of which she was in possession as a limited owner and secondly, because of the two sets of persons between whom she divided the property only one could be said to be her reversioner or reversioners and the other a stranger or strangers. In our opinion the document on its face appears to effect a compromise of the conflicting claims of Gopinath on the one hand and the present plaintiff Ram Charan Das and his brothers on the other to the estate of Kanhaiyalal. In the document Kadma Kuar is referred to as 'first party,' Gopinath as 'second party' and Ram Charan Das, the appellant before us and his brothers as the 'third party'. In clause (1) of the document it is stated "That the first party renounces all her claims to the estate of her son M. Kanhaiyalal deceased according to the provisions of this deed in favour of the second and third parties out of which the second party shall be the absolute owner and possessor of the properties detailed in List 'A' annexed hereto; and the third party shall be the absolute owner and possessors of the properties detailed in the List 'B' annexed hereto." These recitals, taken in conjunction with the surrounding circumstances indicate that Kadma Kuar purported to recognise thereby the rights of these parties to her son's properties though earlier she disputed them. Similarly the recitals,

"that the first party shall remain in *de facto* management of Arrah Kalan property for her life without any interference from the second or the third party to whom she shall in no case be liable to render any accounts and that after her death the second party or his heirs representatives, assigns or transferees and Babu Sehat Bahadur, Advocate, Allahabad, as representing the third party or their heirs, representative, assigns or transferees shall manage and enter into possession of the said village Arrah Kalan jointly,"

indicate that the second and third parties were disputing and interfering with the right of Kadma Kuar to the management of one of the properties but ultimately, under the document in question, they agreed not to do so. Further, as we have already pointed out, three suits had been instituted in the year 1932 concerning this very property, one by Gopinath and the other two by the plaintiff and his brother Hanuman Prasad. In his suit Gopinath claimed to be the next reversioner. The plaintiff-appellant Ram Charan Das claimed that he and his brothers were the next reversioners and not Gopinath. A similar claim was made by Hanuman Prasad in his suit. It is worthy of note that the plaintiff's suit was compromised on the very day on which this document, Exhibit Y-13, was executed and that the terms of the settlement were recited in Exhibit Y-13. This document further makes express mention of the two suits which were companion suits, Suit No. 53 of 1932 and Suit No. 54 of 1932, and says categorically that these suits shall be deemed to be compromised in terms of this deed. By compromising those two suits the plaintiff and his brother Hanuman Prasad withdrew their challenge to the claim put forward by Gopinath to the estate of Kanhaiyalal. Prior to this Gopinath had withdrawn his suit in which he had claimed to be the next reversioner to the estate of Kanhaiyalal after the death of Kadma Kuar. All these transactions are quite evidently part of one main transaction which is the settlement by the members of the family of all those disputes once and for all. No doubt according to the plaintiff allegation this was merely a temporary arrangement but no reasons have been given nor any material was placed before the Court from which it could

be inferred that it was not the intention of the parties that the disputes amongst them should be finally settled.

Mr. Sinha, however, places reliance upon the following recital in Exhibit Y-13 and contends that the arrangement was not final. The recital runs thus :

"That in pursuance of and for the purpose of this deed the first and the third party do admit and recognise Babu Gopi Nath, the second party to be the son of Musammat Peari Bibi the own sister of the late Munshi Kanhaiyalal and the daughter of Musammat Kadma Kuar the first party, and similarly for the purposes of and in pursuance of this deed, the first and the second party admit and recognise the third party as the sons of Dewan Madan Gopal, a great-grandson of M. Lalji, the great-grandfather of M. Kanhaiyalal as per pedigree set up by them in Suits Nos. 53 and 54 of 1932—referred to above. Provided always that if the rights of the second or the third party to the ownership and possession of their respective properties as detailed in List 'A', items Nos. 1 to 5 and 7, in List 'B', items Nos. 1, 2, 4, 5 and 8 respectively, are ever questioned they shall not be precluded from setting up any claim, right or title, propositions of law or fact consistent or inconsistent with the recital of this deed, and if the rights of ownership or possession of the second party to item No. 6 in List 'A', annexed hereto or the rights of ownership or possession of the third party to items Nos. 3, 6 and 9 in List 'B' annexed hereto are ever questioned they shall only be entitled to set up claims only consistent with the terms of this deed."

No doubt, the recognition of relationship claimed by the second party to Kanhaiyalal was admitted by the first and third parties in pursuance and for the purposes of the deed. Similarly, recognition of the relationship of the third party by the first and the second parties to Kanhaiyalal was admitted by the first and second parties and also in pursuance and for the purposes of the deed. This, however, does not show that the settlement arrived at and sought to be given effect to by the deed was not intended to be final. As already stated, the document read as a whole leaves no doubt that it was intended to be a final settlement of the disputes amongst the parties. If it were intended to be otherwise it would have been natural to find an express statement somewhere in the document to show that it was intended to be a temporary settlement only. The proviso to the aforesaid clause was pressed in aid by Mr. Sinha to support his contention that the settlement was only temporary. The document itself was drawn up in English and looking at the formal manner in which it is drawn up and bearing also in mind the fact that it came into being when litigations were pending in Court in which the parties to the deed also figured as parties and was intended to compromise those suits, it would be legitimate to infer that it was drawn up or at least approved by a lawyer. In that proviso at one place the word "recitals" and at another the word "terms" were used. The expression "recitals" occurs in the first part of the proviso and it is only with respect to them that a party is given the liberty to set up in a certain circumstance "any claim or right or title, propositions of law or fact consistent or inconsistent with the recitals in the deed". Now the expression "recitals" means, according to the Dictionary of English Law by Jowitt : "statements in a deed, agreement or other formal instrument, introduced to explain or lead up to the operative part of the instrument". It is stated further that recitals are generally divided into narrative recitals which set forth the facts on which the instrument is based and introductory recitals which explain the motive for the operative part. Where the recitals are clear and the operative part is ambiguous the recitals govern the construction. Normally a recital is evidence as against the parties to the instrument and those claiming under them and in an action on the instrument itself the recitals operate as an estoppel, though that would not be so on a collateral matter. It is not clear why this clause was put in. But even if we assume that the parties did so because they were apprehensive that the rights of the second or the third party to the ownership and possession of the respective properties—that is, items 1 to 5 and 7 in List "A" allotted to the second party and items 1, 2, 4, 5, and 8 in List "B" allotted to the third party were liable to be challenged by persons not bound by the settlement the reservation was only of the right to challenge the explanatory or narrative recitals in the documents but not of the right to challenge the terms thereof. It therefore affords little assistance to the plaintiff. The expression "terms" used in a document, would, according to Webster's New World Dictionary, mean "conditions of a contract, agreement, sale, etc., that limit or define its scope or action involved". Those parts of Exhibit 13 which prescribe the conditions upon

which the disputes among the parties were settled would be the terms of this document and so far as these are concerned the proviso shows that none of the parties was given the liberty to derogate from them. Thus, far from showing that the settlement arrived at was of a temporary character the proviso read as a whole further fortifies the conclusion that the settlement was to be binding upon the parties for all time. We may add that the contentions now raised on behalf of the plaintiff denying the rights of Gopinath and of those who claim through him are not based upon any challenge to the "recitals" in the documents, as that expression is understood in law, but to the terms and conditions contained in that document. It may be that the properties to which the suit relates would fall under the items allotted to Gopinath as specified in the first part of the proviso but no liberty has been reserved therein to permit any of the parties to derogate from the terms and conditions upon which the settlement was arrived at.

The view that the transaction is a family arrangement is borne out by the decision of the Privy Council in *Ramgouda Annagouda v. Bhausahab*¹. The facts of the case which have been correctly summarised in the Head Note are briefly these :

"A Hindu died in 1846, leaving a widow who survived until 1912, and a daughter. On the death of the widow A was heir to the estate. In 1868 the widow had alienated nearly the whole property by three deeds executed and registered on the same day. By the first deed she gave a property to her brother, by the second she sold half of another property to A and by the third she sold the other half of that property to her son-in-law. The signature of each of the deeds was attested by the two other alienees. A who survived the widow for six years did not seek to set aside any of the alienations. After his death his son and grandsons brought a suit to recover the whole property."

Upon these facts the Privy Council held as follows :

"Their Lordships consider that the decision of this case depends upon how far the three documents can be taken as separate and independent, or so connected as to form one transaction."

The long lapse of time between the execution of the deeds and the institution of the suit has rendered it impossible to prove what actually occurred between the parties on that occasion. There is not sufficiently definite evidence to come to a conclusion as to how far any of those properties were validly encumbered, or what was done with the purchase money alleged to have passed on the two deeds of sale. But the parties to the documents included, or after so great a lapse of time may be presumed in a very real sense to have included, all persons who had any actual or possible interest in the properties, namely, the widow herself her brother, who was a natural object of her affection and bounty, her son-in-law, who was the natural protector of the interests of her daughter and grandson, and the nearest kinsman on the husband's side and the only person from whom any opposition might be apprehended with regard to dealings by the widow concerning her husband's estate.

Their Lordship conclude that all the circumstances strongly point to the three documents being part and parcel of one transaction by which a disposition was made of Akkagouda's estate, such as was likely to prevent dispute in the future and therefore in the best interest of all the parties. The three deeds appear thus to be inseparably connected together and in that view Annagouda not only consented to the sale of Shivgouda and the gift to Basappa but these dispositions formed parts of the same transaction by which he himself acquired a part of the estate."

In our case, however, there is fortunately only one transaction and we have definite evidence to show that there were disputes amongst the members of the family and it was avowedly for settling them that the transaction was entered into. Further we have material to show that all the persons who can be said to be interested in the property were joined as parties to the transaction. In that sense this case is stronger than the one which the Privy Council had to consider. We have therefore no hesitation in holding that the plaintiff who has taken benefit under the transactions is not now entitled to turn round and say that that transaction was of a kind which Kadma Kuar could not enter into and was therefore invalid. Moreover acting on the terms of that document Gopinath paid monies to the Court of Wards for obtaining release from its management of the properties which were allotted to him. The rule of estoppel embodied in section 115 of the Indian Evidence Act, 1872 would, therefore, shut out such pleas of the plaintiff. Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family. The word "family" in the context is not to be understood in a narrow sense of being a

group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. In *Ramgouda Annagouda's case*¹, of the three parties to the settlement of a dispute concerning the property of a deceased person one was his widow, other her brother and the third her son-in-law. The two latter could not, under the Hindu Law, be regarded as the heirs of the deceased. Yet, bearing in mind their near relationship to the widow the settlement of the dispute was very properly regarded as a settlement of a family dispute. The consideration for such a settlement, if one may put it that way, is the expectation that such a settlement will result in establishing or ensuring amity and goodwill amongst persons bearing relationship with one another. That consideration having passed by each of the disputants the settlement consisting of recognition of the right asserted by each other cannot be permitted to be impeached thereafter.

The final contention of Mr. Sinha is based upon section 37 (a) of the U. P. Court of Wards Act, 1912. The relevant portion of this provision runs thus :

“A ward shall not be competent—

(a) to transfer or create any charge on, or interest in, any part of his property which is under the superintendence of the Court of Wards, or to enter into any contract which may involve him in pecuniary liability.”

Here the transaction in question is a family settlement entered into by the parties *bona fide* for the purpose of putting an end to the dispute among family members. Could it be said that this amounts to a transfer of or creation of an interest in property? For, unless it does, the action of Kadma Kuar would not fall within the purview of the aforesaid clause of section 37. In *Mst. Hiran Bibi v. Mst. Sohan Bibi*², approving the earlier decision in *Khunni Lal v. Govind Krishna Narain*³ the Privy Council held that a compromise by way of family settlement is in no sense an alienation by a limited owner of family property. This case, therefore, would support the conclusion that the transaction does not amount to a transfer. Mr. Sinha, however, contends that the transaction amounts to creation of an interest by the ward in property which was under the superintendence of the Court of Wards and in support of his contention relies on *Man Singh v. Nowlakhbati*⁴. In the first place once it is held that the transaction being a family settlements is not an alienation, it cannot amount to the creation of an interest. For, as the Privy Council pointed out in *Mst. Hiran Bibi's*² case in a family settlement each party takes a share in the property by virtue of the independent title which is admitted to that extent by the other parties. It is not necessary, as would appear from the decision in *Rangasami Gounden v. Nachiappa Gounden*⁵ that every party taking benefit under a family settlement must necessarily be shown to have, under the law, a claim to a share in the property. All that is necessary is that the parties must be related to one another in some way and have a possible claim to the property or a claim or even a semblance of a claim on some other ground as, say, affection. In the second place, in the case relied upon by Mr. Sinha there was no question of the transaction being a family settlement. It was sought to be supported upon the ground that it was a surrender. The Privy Council, however, held that it was not a *bona fide* surrender evidently because the widow was to get a very substantial amount for maintenance from the reversioners in whose favour she had purported to surrender the estate and also held that there was in fact no necessity for a surrender of interest of the widow. Since it was not a *bona fide* surrender it was regarded as one creating only an interest in the property, which was under the superintendence of the Court of Wards. Had it been a *bona fide* surrender section 60 of the Bihar Court of Wards Act upon which reliance was placed in that case would not have been attracted. Indeed, reliance was placed before the Privy Council on the decision in *Sureshwar Misser v. Maheshwari Misra*⁶ in support of the appellant's contention that the transaction was valid. While distinguishing this case the Privy Council observed :

¹. (1927) L.R. 54 I.A. 396; 53 M.L.J. 350.
². 27 M.L.J. 149; A.I.R. 1914 (P.C.) 44.
³. L.R. 38 I.A. 87; 21 M.L.J. 645; (1911) 33 All. 356.
⁴. (1925) L.R. 53 I.A. 11; 50 M.L.J. 332.
⁵. (1918) L.R. 46 I.A. 72; I.L.R. 42 Mad. 523; 36 M.L.J. 493.
⁶. (1920) L.R. 47 I.A. 233; 39 M.L.J. 161.

"In that case there were serious disputes in the family as to title, and the next reversioners to the son sued the widow and her daughters to set aside the will of her husband under which the daughters were entitled to succeed to the immovable property on the death of the son without issue. A family compromise was agreed to, and in performance of it the widow surrendered all her rights of succession to the movable property, and the plaintiff the next reversioner and her daughters gave her for her life a small portion of the land for her maintenance. The Board held that the compromise was *bona fide* surrender of the estate and not a device to divide it with the next reversioner, the giving of a small portion of it to the widow for her maintenance not being objectionable, and consequently that the transaction was valid under the principles laid down by the Board in *Rangasami Gounden v. Nachappa Gounden*¹.

We may further point out that this decision does not refer to their decisions in *Mst. Hiran Bibi v. Mst. Sohan Bibi*² and *Khunni Lal v. Govind Krishna Narain*³ and it cannot be assumed that they intended to depart from their earlier view.

Apart from that it may be pointed out that the two suits which were then pending were compromised with the full knowledge of the Court of Wards, which was also a party to both the suits and the Court of Wards in fact released the estate by accepting from Gopinath monies which were due to it. In these circumstances we hold that the plaintiff is not entitled to press in aid the provisions of section 37 (a) of the U.P. Court of Wards Act.

For all these reasons we uphold the decree of the trial Court as affirmed by the High Court and dismiss the appeal with costs throughout.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

The Public Passenger Service Limited, Chidambaram

— Appellant*

v.

M. A. Khadar and another

— Respondents.

Companies Act (I of 1956), section 155 and Regulation 16 of Table 'A', Schedule I—Notice of intended forfeiture of shares for non-payment of share calls—Requisites of—Non-acceptal of a definite sum as accrued expenses—Defective and invalid—Forfeiture liable to be set aside—Order for rectification of share register, proper.

Practice—Pleadings vague—Points argued without objections—Objection in Second Appeal, not allowed.

Call moneys remaining unpaid, before the due date 19th January, 1957, the appellant company issued on 20th January, 1957 notices of intended forfeiture of shares (under Article 29) calling upon the defaulters to pay at the registered office of the company on or before 30th January, 1957, the called amount together with interest at six per cent. and any expenses that might have accrued by reason of their default, failing which the shares registered in their names will be liable to be forfeited.

In spite of this notice the respondents did not pay and on 11th February, 1957, the Board of Directors passed a resolution (under Article 30) forfeiting the shares held by them.

Meanwhile, on 18th January, 1957, the respondents and other shareholders filed Application No. 119 of 1957 in the High Court of Madras for reliefs under sections 402 and 237 of the Companies Act, 1956, and obtained an *interim* order directing stay of collection of call amounts under the notice of 3rd January, 1957, which order was communicated to directors on 21st January, 1957. On 30th January, 1957, the Court passed a modified *interim* order directing the deposit of call money into Court within a week. As the same was not complied with the *interim* order was vacated on 8th February, 1957, and the application itself was dismissed on 10th April, 1957. The company passed a resolution on 11th February, 1957 (under Article 30) forfeiting the shares.

On 8th November, 1957 the respondents filed separate applications in the High Court of Madras under section 155 of the Companies Act and prayed for setting aside the forfeiture and rectification of

1. (1918) L.R. 46 I.A. 72 : I.L.R. 42 Mad. 36 M.L.J. 493.

2. 27 M.L.J. 149 : A.I.R. 1914 P.C. 44.

* Civil Appeals Nos. 203 and 203 of 1965.

3. L.R. 38 I.A. 87 ; 27 M.L.J. 645 : (1911) I.L.R. 33 All. 356.

Share Register. It was held that the notice of intended forfeiture was defective—particulars of interest and expenses not given—and the forfeiture was invalid. The company appealed, on a certificate granted by the High Court, to the Supreme Court against the said order.

Held, the Regulation relating to calls are followed by Regulations for forfeiture (as in Articles 29 and 30 of the Company). In the light of Article 29 read with similar regulations relating to calls here is no difficulty in holding that the notice dated 20th January, 1957, requiring payment of interest on the call money from the date of default (19th January, 1957) to the date of actual payment is valid. In the present state of the record, no opinion is given as to whether the notice is defective in respect of the demand of interest.)

The object of the notice under Article 29 is to give the shareholder an opportunity for payment of the call money, interest and expenses. The amount of expenses incurred by the company by reason of non-payment is not disclosed. The finding of the High Court that the notice is defective in respect of the demand for expenses has to be agreed. A proper notice is a condition precedent to forfeiture. The defect in the notice, though slight, invalidates it and is fatal to the forfeiture.

Though the affidavits of the respondents in support of their petitions did not give particulars of the defect in the notice of 20th January, 1957, it was pointedly raised in the arguments in the first Court without any objection. The appellant cannot now complain that the pleadings were vague.

Section 155 (1) (a) (vi) of the Companies Act allows rectification of the Share Register if the name of any person after having been entered in the Register, is without sufficient cause omitted therefrom. The omission, due to an invalid forfeiture of shares, is no sufficient cause for the omission of the name of the person holding such shares from the Register.

The order of Court (in another proceeding), dated 30th January, 1957, directing the respondents to deposit into Court the call money within a week, cannot be deemed to be a fresh notice under Article 29.

The Court may refuse relief under section 155 and relegate the parties to a suit only where by reason of its complexity or otherwise the matter can be more conveniently decided in a suit. The point as to the invalidity of notice of intended forfeiture in the instant case could well be decided summarily; the Courts below rightly decided to give relief in the exercise of its discretionary jurisdiction under the section.

The maxim "he who comes into equity must come with clean hands" is applicable only when an equitable relief is prayed for; and the maxim can be invoked where the conduct complained of is unfair or unjust in relation to the subject-matter of the litigation and the equity sued for. It does not mean that every improper conduct of the applicant disentitles him to relief.

Appeals from the Judgment and Decree, dated the 21st December, 1961, of the Madras High Court in O.S. Appeals Nos. 55 and 56 of 1959.¹

K. K. Venugopal and R. Gopalakrishnan, for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (*P. Ram Reddy and A. V. V. Nair*, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Bachawat, J.—The appellant is a limited Company carrying on transport business in South Arcot District. M. A. Khadar, the contesting respondent in Civil Appeal No. 202 of 1965, holds 13 shares and his brother M. A. Jabbar, the contesting respondent in Civil Appeal No. 203 of 1965, holds 163 shares in the Company. Articles 29 and 30 of the Articles of Association of the Company read:

"29. The notice shall name a future day, not being less than seven days from the service of the notice, on or before which such call or other money and all interest and expenses that may have accrued by reason of such non-payment are to be paid and the place where payment is to be made, the place so named being either registered office of the Company. . . . are usually made payable and shall state that in the event of non-payment at or before the time and at the place appointed the share in respect of which such payment is due, will be liable to be forfeited.

30. If the requisitions of any such notice as aforesaid be not complied with, any share in respect of which such notice has been given may, at any time thereafter before payment of all money due thereon with interest and expenses, be forfeited by a resolution of the Directors to that effect."

On 2nd January, 1957, the Board of Directors of the Company passed a resolution calling the unpaid amount of Rs. 25 on each share. On 3rd January, 1957,

a call notice was issued to the shareholders requesting payment on or before 19th January, 1957. The call notice was duly served on the contesting respondents. As the call monies remained unpaid, the Company issued the following notice dated 20th January, 1957, to the respondents under Article 29:

" Sir,

As the call amount of the balance of Rs. 25 for every share held by you remains unpaid in respect of the notice dated 3rd January, 1957, issued in pursuance of the resolution of the Board, I hereby issue this notice calling upon you to pay the called amount at the registered office of the Company on or before Wednesday the 30th January, 1957, together with interest at six per cent and any expenses that might have accrued by reason of such non-payment.

Take further notice that in the event of non-payment as mentioned above, the shares registered in your name will be liable to be, once for all, forfeited without further notice and without prejudice to any legal action that may be taken against you for recovering the balance amount due from you treating the same as a debt due to and recoverable as such by the Company under Article 14.

By order of Board
(Signed) A. R. Hassain Khan
Managing Director."

In spite of this notice, the respondents did not pay the call monies, and on 11th February, 1957, the board of directors passed a resolution under Article 30 forfeiting the shares held by them. On 8th November, 1957, the respondents filed two separate applications under section 155 of the Indian Companies Act, 1956 in the High Court of Madras praying that the forfeitures be set aside and the necessary rectifications be made in the Share Register of the Company. Ramachandra Ayyar, J., allowed the applications, and passed conditional orders for rectification of the Register, and his decision was affirmed by the appellate Court. The Courts below held that in the absence of particulars of interest and expenses, the notice dated 20th January, 1957, was defective and the forfeiture is invalid. The Company now appeals to this Court on a certificate granted by the High Court.

In all standard articles of a company, the regulations relating to calls provide for payment of interest on the unpaid call money at a certain rate from the date appointed for its payment up to the time of actual payment, see Regulation 14 of Table A in the First Schedule to the Indian Companies Act, 1913, Regulation 16 of the Table A in the First Schedule to the Indian Companies Act, 1956 and *Palmer's Company Precedents*, 17th Edn., Part I, p. 437 and the regulations relating to calls are followed by regulations relating to forfeiture like Articles 29 and 30 of the appellant Company. In the light of Article 29 read with similar regulations relating to calls we would have no difficulty in holding that the notice, dated 20th January, 1957, required payment of interest on the call money from the date appointed for the payment thereof, that is to say, 19th January, 1957, up to the time of the actual payment. Unfortunately, all the regulations of the Company relating to payment of calls have not been printed in the paper book and in the present state of the record, we express no opinion on the question whether the notice is defective in respect of the demand for interest.

But we agree with the High Court that the notice is defective in respect of the demand for expenses. The amount of expenses incurred by the Company by reason of the non-payment was not disclosed. The respondents were not informed how much they should pay on account of the expenses. The object of the notice under Article 29 is to give the shareholder an opportunity for payment of the call money, interest and expenses. The notice under Article 30 must disclose to the shareholder presumably conversant with the Articles sufficient information from which he may know with certainty the amount which he should pay in order to avoid the forfeiture. In the absence of particulars of the expenses the respondents were not in a position to know the precise amount which they were required to pay on account of the expenses. A proper notice under Article 29 is a condition precedent to forfeiture under Article 30. Here, the notice under Article 29 is defective, and the condition precedent is not complied with. The slight defect in the notice invalidates it and is fatal to the forfeiture. The Courts, below, therefore rightly declared that the forfeiture was invalid.

Section 155 (1) (a) (iii) of the Indian Companies Act allows rectification of the Share Register if the name of any person after having been entered in the Register is, without sufficient cause, omitted therefrom. There is no sufficient cause for the omission of the name of the shareholder from the Register, where the omission is due to an invalid forfeiture of his shares, and on finding that the forfeiture is invalid, the Court has ample jurisdiction under section 155 to order rectification of the Register. The High Court said that the shareholder may approach the Court under section 155 if he has sufficient cause. This mode of expression was rightly criticised by Counsel for the appellant. The issue under section 155 (1) (a) (ii) is not whether the shareholder has sufficient cause but whether his name has been omitted from the Register without sufficient cause. As the forfeiture is invalid, the names of the respondents were omitted from the Share Register without sufficient cause, and the jurisdiction of the Court under section 155 is attracted.

Counsel for the appellant contended that the point as to the invalidity of the notice dated 20th January, 1957, was not open to the respondents in the absence of any pleading on this point. In the affidavit in support of the application, the respondents pleaded that the steps prescribed before there can be a forfeiture, have not been complied with. No further particulars were given, but the contention as to the invalidity of the notice, dated 20th January, 1957 was pointedly raised in the argument in the first Court. The contention was allowed to be raised without any objection. Had the objection been then raised, the Court might have allowed the respondents to file another affidavit. The appellant cannot now complain that the pleadings were vague.

We may now conveniently refer to certain events which happened after 2nd January, 1957, when the directors resolved to make the call and on 11th February, 1957, when the shares were forfeited. On 18th January, 1957, M.A. Jabbar, M.A. Khadir and other shareholders filed Application No. 119 of 1957 in the Madras High Court praying for reliefs under sections 402 and 237 of the Indian Companies Act, 1956, and obtained an *interim* order directing stay of collection of monies pursuant to the notice dated 3rd January, 1957. The stay order was communicated to directors on 21st January, 1957, after the notice of the intended forfeiture dated 20th January, 1957, was issued. On 30th January, 1957, the Court passed a modified *interim* order restraining the forfeiture of the shares, and directed M.A. Jabbar to pay the call money into Court within one week. The call money was not paid into Court, and on 8th February, 1957, the Court vacated the stay order. Application No. 119 of 1957 was eventually dismissed on 10th April, 1957. Counsel for the appellant contended that (1) by reason of the aforesaid proceedings the respondents waived and abandoned their right to challenge the forfeiture; (2) the order dated 30th January, 1957, substituted a fresh notice of intended forfeiture under Article 29 in lieu of the original notice dated 20th January, 1957, and in the absence of compliance with this order, the forfeiture is valid. Neither of these contentions was raised in the Courts below. We find nothing in the proceedings in Application No. 119 of 1957, from which we can infer a waiver or abandonment by the respondents of their right to challenge the validity of the notice dated 20th January, 1957 and the subsequent forfeiture. We also fail to see how the order of the Court dated 30th January, 1957, can amount to a notice under Article 29. The only notice under Article 29 is the one dated 20th January, 1957, and as that notice is defective, the forfeiture is invalid.

Counsel for the appellant contended that the relief under section 155 is discretionary, and the Court should have refused relief in the exercise of its discretion. Now, where by reason of its complexity or otherwise the matter can more conveniently be decided in a suit, the Court may refuse relief under section 155 and relegate the parties to a suit. But the point as to the invalidity of the notice dated 20th January, 1957, could well be decided summarily, and the Courts below rightly decided to give relief in the exercise of the discretionary jurisdiction under section 155. Having found that the notice was defective and the forfeiture was invalid, the Court could not arbitrarily refuse relief to the respondents.

Counsel for the appellant points out that the respondents are the trade rivals of the appellant and are anxious to cripple its affairs and the appellate Court recorded the finding that the respondents were acting *malafide* and prejudicially to the interests of the appellant and their conduct in taking various proceedings against the appellant is reprehensible. Counsel then relied upon the well-known maxim of equity that "he who comes into equity must come with clean hands", and contended that the Courts below should have dismissed the applications as the respondents did not come with clean hands. This contention must be rejected for several reasons. The respondents are not seeking equitable relief against forfeiture. They are asserting their legal right to the shares on the ground that the forfeiture is invalid, and they continue to be the legal owners of the shares. Secondly, the maxim does not mean that every improper conduct of the applicant disentitles him to equitable relief. The maxim may be invoked where the conduct complained of is unfair and unjust in relation to the subject-matter of the litigation and the equity sued for. The unwarranted proceedings under sections 402 and 237 of the Indian Companies Act, 1956 and other vexatious proceedings started by the respondents have no relation to the invalidity of the forfeiture and the relief of rectification and are not valid grounds for refusing relief.

In the result, the appeals are dismissed. There will be no order as to costs.

K. G. S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, M. HIDAYATULLAH, J. C. SHAH, S. M. SIKRI AND R. S. BACHAWAT, JJ.

Bashiruddin Ashraf

.. *Appellant**

v.

The Bihar Subai Sunni Majlis-Awaqf and another

.. *Respondents.*

Bihar Wakfs Act (VIII of 1948), section 27 (2) (h)—Wilful disobedience of orders and directions of the Majlis by the Mutawalli—Power of removal vested in the Majlis by an amendment—Exercise of power in respect of orders and directions issued before the amendment—Permissible—Orders and directions by Majlis—Distinction.

Interpretation of Statutes—Amending Act granting exercise of power on the basis of conduct prior to amendment—Intention to reach back conduct clear—No retrospectivity given thereby to amending Act.

Practice—Judgment of High Court in appeal before Supreme Court—Omission of an argument addressed by Counsel before the High Court in its judgment—Allegation not ordinarily sustainable in Supreme Court—Duty of Counsel.

By the amendment to section 27 (2) (h) of the Bihar wakf Act, the removal of the Mutawalli on the ground that he had wilfully disobeyed the orders and directions of the Majlis under the Act could be made, after the amendment, by the Majlis itself without the intervention of the District Judge. After the amendment the District Judge ceased to possess this power.

The amendment, no doubt, conferred jurisdiction upon the Majlis to act prospectively, from the date of the amendment but the power under the amendment could be exercised in respect of the orders and directions issued by the Majlis and disobeyed by the Mutawalli before the amendment came into force.

A statute is not necessarily used retrospectively when the power conferred by it is based on conduct anterior to its enactment, if it is clearly intended that the said power must reach back to that conduct. It would be another matter if there was a vested right to continue which was taken away.

Orders and directions express the binding wish of the Majlis and the two words only differ in degree. An order is more peremptory than a direction.

The High Court is a Court of Record and unless an omission is admitted or is demonstrably proved the Supreme Court will not consider an allegation that there is an omission of an argument of Counsel.

It is not necessary that the judgment of the High Court should record and repel each individual argument however hollow. If any material point does not come under scrutiny the fact should be brought to the notice of the High Court before the judgment is signed and an order of the High Court on such submission obtained before it is raised in appeal. The Supreme Court will ordinarily regard the details of the argument given in the judgment of the High Court as correct and will not enter upon an enquiry as to what was or was not argued there. To permit points to be mooted on the plea that they were raised before the High Court but were not considered by it would open the door to endless litigation and this would be destructive of the finality which must attach to the decision of the High Court on matters of fact.

Appeal from the Judgment and Decree Order dated the 21st December, 1960, of the Patna High Court in Misc. Appeals Nos. 688 of 1958, 38 of 1959 and Civil Revision No. 1153 of 1958.

Tarkeshwar Dayal and *K. K. Sinha*, Advocates, for Appellant.

Sarjoo Prasad, Senior Advocate, (*U. P. Singh*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Hidayatullah, J.—The appellant Bashiruddin Ashraf was Mutawalli of certain Waqf properties in Monghyr District, dedicated by one Sheikh Golam Yahya by a registered Waqfnama dated 11th April, 1870. Under this deed, Mutwallis were chosen from the descendants in the male line of the Waqif from generation to generation. The first Mutwalli was the Waqif. After his death, his wife held charge of the *Toliat*. After her death of appellant's father and from 1930 the appellant were Mutwallis. The Mutwalli in-charge was entitled to 9/48th share of the income as his remuneration. On 1st April, 1948, the Bihar Waqfs Act, 1947 (VIII of 1948) came into force and this Waqf came under the purview of that Act and was registered as Waqf No. 67. Under the scheme of the Act the Bihar Subai, Sunni Majlis-e-Awaqf (shortly Majlis) began supervising this Waqf. At all material times one Syed Bashiruddin was the *Sadr* (Chairman) of the Majlis and Syed Mehdi Hassan was the *Nazir-e-Awaqf* under section 22.

On 2nd March, 1949 Syed Naziruddin Ashraf (step-brother of the appellant) and some others presented an application for removal of the appellant from Mutwalliship on numerous charges, including mismanagement, misappropriation, wanton waste and dissipation of Waqf property, falsification of accounts, etc. This was registered as Case No. 37 of 1949. An enquiry was made by Mehadi Hassan, who reported on 25th May, 1950 to the Majlis that the charges levelled against the appellant were proved. His report was considered by the Majlis at its meeting dated 20th August, 1950 and a notice was issued to the appellant to show cause why he should not be removed. He showed cause. The *Nazir* was directed to submit a second report which he did on 15th October, 1950. The appellant was then examined and on 28th November, 1950 the *Sadr* passed an order agreeing with the report of the *Nazir* and confirming the findings given by the *Nazir* regarding mismanagement, etc. An auditor was appointed to check the accounts and he reported on 8th February, 1951 that a sum of Rs. 9,682-1-3 was due from the appellant to the Waqf estate. The *Sadr* ordered the appellant to deposit this amount in a recognised bank on or before 2nd April, 1951. When the appellant failed to deposit the amount, the *Sadr* passed an order on 28th June, 1951 removing him from the office and appointed in his place a pleader (Maulvi Mohammad Shoeb) as Mutwalli for a period of one year under section 32 of the Act and directed him to take charge of the property of the Waqf from the appellant.

The appellant then made an application to the District Judge under section 27 (3) of the Bihar Waqfs Act for setting aside the order of the *Sadr* and the proceedings were registered as Miscellaneous Case No. 30/4 of 1951. The order of the *Sadr* was assailed on several grounds, some of fact and others of law. By the petition the appellant also asked for the removal of Maulvi Md. Shoeb from Mutwalliship. The present appeal arises from the order passed by the Additional District Judge, Mon-

ghyr and the judgment of the High Court dated 21st December, 1960 on appeals from that order.

In the proceedings before the District Judge four issues were settled on the pleadings of the appellant and the pleadings in reply. They were :

(i) Whether the Majlis or the *Sadr* was competent and had jurisdiction to direct the Mutwalli to produce the accounts of the waqf estate, hold enquiries and pass orders on the basis of such enquiries for a period prior to the enforcement of the Act?

(ii) Whether the Majlis or the *Sadr* was competent and had jurisdiction to pass the order of removal of the applicant from the office of the Mutwalli on the grounds mentioned in the order dated 28th June, 1951?

(iii) Whether the Majlis or the *Sadr* was competent and had jurisdiction to appoint Maulvi Mohammed Shoeb as a temporary Mutwalli?

(iv) Whether section 27 and 32 of the Act *ultra vires* of the Constitution of India?

The Additional District Judge, Monghyr decided all the issues, except the 3rd, against the appellant. On the first two issues he held that the *Sadr* was competent to pass the order of removal on the basis of disobedience of orders passed prior to the coming into force of the amending Act. The fourth issue was not pressed in that form but a new point analogous to the first issue was raised to which we shall refer presently. The order appointing the temporary Mutwalli questioned in the third issue was held to be without jurisdiction on the ground that it had to be ratified by the District Judge under section 32 and the appointment was vacated. The new point was that section 27 (2) (h) (iii) added by the amending Act, 1951, was not retrospective and could only operate from 6th June, 1951, which was stated to be the date from which the amending Act came into force, and that the power of the Majlis could only be exercised in respect of events happening subsequent to that date. This contention of the appellant was rejected.

Two appeals were filed against the order of the Additional District Judge by the appellant and Maulvi Md. Shoeb respectively. A revision application was also filed on behalf of the Majlis and Maulvi Md. Shoeb as a matter of abundant caution. The appellant had raised in the High Court as many as 41 grounds: the first five grounds raised the contention that the powers conferred on the Majlis, which formerly belonged to the District Judge, could only operate from 6th June, 1951, and as no order or direction of the Majlis was disobeyed after 6th June, 1951, the order passed on 28th June, 1951 on the old material was illegal and void. Grounds 23 and 29 (a) to (f) raised the contention that sections 27, 55, 56, 57, 59 and 60 of the Bihar Act VIII of 1948 were void as offending the fundamental rights of appellant under Articles 19, 25, 26 and 31 of the Constitution. The remaining grounds dealt with the jurisdiction to order the enquiry to be held by the *Nazir* and the merits of the order of the *Sadr* in relation to the evidence. By these grounds the appellant contended that the order of the *Sadr* was actuated by bias, prejudice and *mala fides* and was erroneous, perverse and illegal. The order of the Additional District Judge was also characterised as perverse, erroneous and illegal.

The two appeals were heard together. The High Court by a common judgment delivered on 21st December, 1960, dismissed the appeal of the appellant and accepted that of Maulvi Md. Shoeb. In dealing with the appeal of Maulvi Md. Shoeb the High Court pointed out that section 32 of the Act was clear in conferring jurisdiction on the Majlis to make temporary appointment when there was a vacancy in the office of the Mutwalli and that the words in that section "subject to any order by the competent Court" did not mean that there had to be either prior permission or subsequent assent before the appointment was complete. The High Court rightly pointed out that those words denoted that the appointment was to endure according to its tenor till an order to the contrary was passed by a competent

Court. This conclusion is so patently correct that we need say nothing more than this.

On merits of the removal of the appellant the High Court endorsed the view of the Additional District Judge. The learned Advocate raised the contention before us that a number of his arguments on facts brought to the notice of the Hon'ble Judges were not considered and in the application for leave to appeal to this Court he had mentioned those contentions as grounds No. 31 (a) to (p). We did not permit the learned Counsel to raise these grounds and we may say here that we deprecate the growing practice of making such allegations against the High Courts. The judgment here is fairly long and considered and it appears to take note of arguments on questions of fact and law. It is not necessary that the judgment should record and repel each individual argument however hollow. If any material point does not come under scrutiny the fact should be brought to the notice of the High Court before the judgment is signed and an order of the High Court on such submission obtained before it is raised in appeal. This Court will ordinarily regard the details of the argument given in the judgment of the High Court as correct and will not enter upon an enquiry as to what was or was not argued there. To permit points to be mooted on the plea that they were raised before the High Court but were not considered by it would open the door to endless litigation and this would be destructive of the finality which must attach to the decision of the High Court on matters of fact. The High Court is a Court of Record and unless an omission is admitted or is demonstrably proved this Court will not consider an allegation that there is an omission. The truth of the allegations against the appellant was investigated by the *Nazir* and the charges were held proved. The report of the *Nazir* was accepted by the *Sadr*, the Additional District Judge and the High Court. The appellant has had a very fair trial and it is plain that the appellant cannot be allowed to have the whole issue debated again because he has thought out fresh arguments.

This disposes of all questions of fact and we now proceed to consider arguments relating to law which were mainly concerned with the jurisdiction of the Majlis and/or the *Sadr* to pass the order of removal. It may be pointed out here that at the suit of the present appellant, section 58 of the Bihar Waqfs Act, 1947 was previously challenged as *ultra vires* the Constitution. This Court by its judgment in *Bashiruddin Ashraf v. State of Bihar*¹ held the section to be valid. The appellant was already removed from his office of Mutwalli when he raised that contention in a criminal matter arising under section 65 (1) of the Bihar Waqfs Act for disobeying orders and directions made to him by the Majlis. At that time the appellant did not question the validity of any other section of the Act; nor did he describe any other section as offending his fundamental rights. Though he raised the question of his fundamental rights the provisions of the Waqfs Act are so manifestly in the public interest that the appellant did not challenge the Act as such. The only sections which he challenged before the Additional District Judge were sections 27 and 32 of the Act. In the High Court some other sections were also challenged, but at the hearing before us the attack was confined to section 27 and the powers of the *Sadr* to act for the Majlis under section 32 of the Act. These cannot be said to be unconstitutional in any way and the action has thus been placed before us as falling outside these sections or not supported by them.

Section 27 of the Bihar Waqfs Act enumerates the powers and duties of the Majlis. It is divided into three sub-sections. By the first sub-section the general superintendence of all Waqfs is vested in the Majlis and it is granted power to do all things reasonable and necessary to ensure that the waqfs are properly supervised and administered and their income is duly appropriated and applied to the objects of such waqfs. Sub-section (2) then by way of illustration, and without prejudice to the generality of the provisions of the first sub-section, enumerates particular powers and duties of the Majlis. Clause (h) of this sub-section enables the Majlis "to

1. (1957) S.C.J. 714. (1957) M.L.J. (Cr.) Patna 942; A.I.R. 1957 S.C. 645.
681. (1957) S.C.R. 1032; I.L.R. (1957) 36

remove a Mutwalli from his office if such Mutwalli refuses to act or *wilfully disobeys the orders and directions of the Majlis under this Act 1951*". The italicized words were inserted by section 2 of the Bihar Waqfs (Amendment) Act, (Bihar Act XVIII of 1951) from 24th May, 1951 on which date the amending Act received the assent of the Governor of Bihar. Previously these words (omitting "orders and") were included as sub-clause (iv) of clause (a) of sub-section (1) of section 47 as part of the grounds on which the District Judge possessed the power to remove a Mutwalli on the application of the Majlis. In other words, the removal of the Mutwalli on the ground that he had wilfully disobeyed the orders and directions of the Majlis under the Act could be made, after amendment, by the Majlis itself without the intervention of the District Judge. After the amendment the District Judge ceased to possess this power.

The contention of the appellant was that as this amendment was not retrospective the power could only be exercised in respect of orders and directions of the Majlis given *after* the date on which amended Act came into force, and not in respect of orders and directions issued previously. According to him, the amending Act is being given retrospective operation which is not permissible. We do not see any force in these contentions. The amendment, no doubt, conferred jurisdiction upon the Majlis to act prospectively from the date of the amendment but the power under the amendment could be exercised in respect of orders and directions issued by the Majlis and disobeyed by the Mutwalli before the amendment came into force. To hold otherwise would mean that in respect of the past conduct of the Mutwalli neither the Majlis nor the District Judge possessed jurisdiction after the amendment came into force. This could hardly have been intended. The enquiry had already commenced before the Majlis and it would have reported to the District Judge for removal of the appellant but this was unnecessary because the Majlis itself was competent to act. A statute is not necessarily used retrospectively when the power conferred by it is based on conduct anterior to its enactment, if it is clearly intended that the said power must reach back to that conduct. It would be another matter if there was a vested right which was taken away but there could be no vested right to continue as Mutwalli after mismanagement and misconduct of many sorts were established. The Act contemplates that such a Mutwalli should be removed from his office and that is what is important. This argument was rightly rejected by the High Court and the Court below.

It was also contended that the clause, as it stood in section 47 prior to the amendment mentioned "directions" but not "orders" and the breach of "orders" before the amendment could not lead to the exercise of the new power by the Majlis after the amendment. The argument is not only new but is also utterly wrong. Orders and directions express the binding wish of the Majlis and the two words only differ in degree. An order is more peremptory than a direction and an argument can never be right which suggests that while disobedience of a direction should merit the punishment of removal disobedience of an order should go unpunished.

Lastly, it was contended that the powers of removal conferred on the Majlis could not be exercised by the *Sadr* when the matter was already before the Majlis. Sections 37 and 38 provide :

"37. *Exercise by Sadr of powers of Majlis.*—If any necessity arises for immediate action by the Majlis, and a meeting of the Majlis cannot be arranged in time to take such action, the *Sadr* may exercise any power that could be exercised under this Act by the Majlis, but shall at the next meeting of the Majlis make a report in writing of the action taken by him under this section and the reasons for taking such action."

"38. *Delegation of powers of Majlis.*—The Majlis may delegate any of its powers and duties under this Act to the *Sadr*, to be exercised and performed in such special circumstances as the Majlis may specify, and may likewise withdraw any such delegation."

There is nothing to show that the powers of the Majlis were not delegated. But even if section 38 did not apply it would appear from section 37 that the *Sadr* possessed all the powers of the Majlis in an emergency and the High Court and the

Additional District Judge have concurrently held that it was necessary to remove forthwith the appellant and to take away from him the property of the Waqf, particularly when he disobeyed the order of the Majlis and did not deposit the amount which the auditor found was due to the waqf. The order of the *Sadr* was reported to the Majlis and the Majlis also approved of it. This is hardly a ground which can be considered in this Court.

The appeal is devoid of merit. It fails and is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, M. HIDAYATULLAH, J. C. SHAH, S. M. SIKRI AND R. S. BACHAWAT, JJ.

Kays Construction Company (P.), Ltd.

.. *Appellant**

The State of Uttar Pradesh and others

.. *Respondent.*

U.P. Industrial Disputes Act, 1947, section 6-H (1) and (2)—“Money due” under sub-section (1) and benefit capable of being computed in terms of money under sub-section (2)—Distinction—Back wages for the period of unemployment made under an award of Industrial Tribunal—Falls under sub-section as “money due” liable to be recovered as an arrear of land revenue.

The “money due” as back wages for the period of unemployment, made under an award, is covered by the first sub-section to section 6 and can be recovered from the employer as an arrear of land revenue.

The difference between the two sub-sections of section 6 arises from the fact that the benefit contemplated in the second sub-section is not “money due” but some advantage or perquisite which can be reckoned in terms of money.

The contrast in the two sub-sections between “money due” under the first sub-section and the necessity of reckoning the benefit in terms of money before the benefit becomes “money due” under the second sub-section shows that mere arithmetical calculations of the amount due are not required to be dealt with under the elaborate procedure of the second sub-section.

Appeals by Special Leave from the Judgment and Order dated the 15th March, 1962 of the Allahabad High Court in Special Appeal No. 574 of 1960 and Supreme Court Appeal No. 53 of 1962 respectively.

Sir Iqbal Ahmed, Senior Advocate (*K. Rajendra Chaudhuri* and *K. R. Chaudhuri*, Advocates, with him), for Appellant (In both the Appeals).

C. B. Aggarwala, Senior Advocate (*O. P. Rana*, Advocate, with him), for Respondents Nos. 1 to 4 (In both the Appeals).

The Judgment of the Court was delivered by

Hidayatullah, J.—These are two appeals by Special Leave in which Kays Construction Co. (P.), Ltd., is the appellant. Civil Appeal No. 1108 of 1963 is against a judgment of the Allahabad High Court dated 15th March, 1962 and Civil Appeal No. 1109 of 1963 is against an order of the same High Court dated 9th May, 1962 declining to certify the case under Article 133 of the Constitution as in the opinion of the High Court the proceedings from which the appeal arose before the High Court was not a civil proceeding within Article 133. As Special Leave has been granted against the judgment of the High Court and we are of opinion that the appeal against that judgment must be dismissed, we do not think it necessary to decide the other appeal.

The facts of the case may now be stated briefly. The appellant Company is the successor of a private concern which went under the name of Kays Construction Company and was owned by one Mr. H. M. Khosla who is now Managing

Director of the appellant Company. It appears that Mr. Khosla found it unprofitable to continue the business as his own and he stopped it for a while before Kays Construction Co. (P.), Ltd., came into existence. The appellant Company took over the business and with it, some of the workmen of the former concern but not all. This led to an Industrial dispute before the Allahabad Industrial Tribunal (Sugar) and an award was made on 31st January, 1958. One of the questions in dispute before the Tribunal was the reinstatement and back wages of the workmen who were not re-employed by the appellant Company. The Tribunal delivered an award. The parties to this appeal have not cared to produce the award but an extract from it relevant to this part of the controversy is on the record and it runs as follows :

"As a result of my findings above, I hold that management of Messrs. Kays Construction Co. (Private), Limited Allahabad, are required to reinstate the old workmen given in the Annexure of Messrs. Kays Construction Co., Allahabad. They will be restored in their old or equivalent jobs and given continuity of service. In view of the somewhat peculiar features of this case and in the largest interest of the Industry, I would, however, order that the workmen be paid only 50 per cent. of their back wages for the period they were forcibly kept out of employment."

After this award a large number of the workmen preferred claims for their back wages purporting to do so under the first sub-section of section 6-H of the U.P. Industrial Disputes Act, 1947. That section, shorn of provisions which do not concern us, reads as follows :

"6-H. (1) Where any money is due to the workmen from an employer under the provisions of section 6-H to 6-R, under a settlement or award, or under an award given by an adjudicator or the State Industrial Tribunal appointed or constituted under this Act, before the commencement of the Uttar Pradesh Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956, the workman may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the money due to him, and if the State Government is satisfied that any money is so due, it shall issue a certificate for the amount to the Collector who shall proceed to recover the same as if it were an arrear of land revenue.

(2) Where any workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may subject to any rule that may be made under this Act be determined by such Labour Court as may be specified in this behalf by the State Government, and the amount so determined may be recovered as provided for in sub-section (1)

(3)

The appellant Company made a large number of objections to this demand before the Labour Commissioner, U.P. to whom the powers of the State Government under the first sub-section of section 6-H had been delegated. These objections, shortly stated, were that some of the workmen had already accepted employment either with the appellant Company or elsewhere and that some of them were either not parties to the original dispute or had died subsequent to the award. The appellant Company also contended that as the exact number of days for which different workmen had been forcibly kept out of employment was not determined an order under section 6-H (1) could not be passed. There were some other contentions into which it is not necessary to go because the case now lies within a narrow compass.

On 21st July, 1958, the Labour Commissioner, purporting to act under the first sub-section of section 6-H issued a certificate to the Collector, Allahabad for the recovery of Rs. 1,06,588-6-6. Certain objections having been filed by the appellant Company before the State Government, the Regional Conciliation Officer, Allahabad was ordered to verify the claims. In the meantime, the Labour Commissioner issued another certificate on 9th September, 1959, by which the sum to be recovered was reduced to Rs. 50,654-9-6. This was said to be certainly due and it was stated that for the balance another certificate would issue after the claims were fully verified. On 10th September, 1959, the Collector passed an order which was communicated telegraphically to the Chief Mechanical Engineer, North-East Railway, Gorakhpur demanding the said sum for payment to the workmen from the security deposited by the appellant Company with the Chief Mechanical Engineer. On 2nd November, 1959, the appellant Company filed a petition under

Article 226 of the Constitution to have the orders dated 9th and 10th September, 1959, quashed by a writ of *certiorari* or by any other suitable order or direction and for release of some property which, it may be mentioned, was under attachment after the first certificate was issued. The petition was heard by Mr. Justice Broome of the Allahabad High Court and was allowed by him. He quashed the two orders of the Labour Commissioner and the attachment of the property on condition that the Company furnished adequate security to the satisfaction of the District Magistrate of Allahabad.

The dispute was considerably narrowed before Broome, J. The only question that was considered was whether the claim of the workmen before the Labour Commissioner fell to be considered under the first or the second sub-section of section 6-H. Mr. Justice Broome relying upon the analogy of *M. S. N. S. Transports, Tiruchirappalli v. Rajaram and another*¹ decided under section 33-C of the Industrial Disputes Act and *Seshmusa Sugar Works, Ltd. v. State of Bihar and others*² decided under section 20 of the Industrial Disputes (Appellate Tribunal) Act, 1950, held that as the exact amount was required to be determined, proceedings had to be taken before the Labour Court under the second sub-section to determine the money equivalent of the "benefit" to which the workmen were entitled before the certificate could issue. In other words, Broome, J., was of opinion that the application of the first sub-section of section 6-H was premature and thus erroneous.

Against this decision an appeal was filed under the Letters Patent of the High Court and by the order, now under appeal, the judgment of Broome, J., was reversed. The Division Bench held that the words of the second sub-section "any benefit which is capable of being computed in terms of money" indicated benefits like free quarters or free electricity and not something which a workman earned through his labour. Reliance was placed upon a decision of this Court in *S. S. Shetty v. Bharat Nidhi, Ltd.*³ where Bhagwati, J., has pointed out that if any benefit awarded by the Tribunal was not expressed in terms of money it was necessary to have it computed in terms of money before the appropriate Government could be asked to help in the recovery under section 20 (2) of the Industrial Disputes (Appellate Tribunal) Act, 1950. In the opinion of the Division Bench this decision supported their conclusion that the computation in terms of money of a 'benefit' was something different from mere arithmetical calculation of the amount of back wages. The Divisional Bench distinguished *Kasturi & Sons (P.), Ltd. v. N. Salivatesaram and another*⁴, on the ground that section 17 of the Working Journalists' (Conditions of Service and Miscellaneous Provisions) Act, 1955 referred expressly to money due by way of compensation, gratuity and wages. The case in *Punjab National Bank, Ltd. v. Kharbunda*,⁵ where it was held that monetary advantage or profit was not necessarily outside the word 'benefit' as used in section 33-C of the Industrial Disputes Act, 1947, was also distinguished. In view of these cases the Division Bench did not follow the two rulings of the High Court cited earlier and another reported in *Shri Amarsinghi Mills, Ltd. v. Nagarashua (M.P.) and others*⁶.

It is contended before us that the judgment of the Divisional Bench is erroneous in its interpretation of section 6-H (1) and (2). The question thus is—how are the two sub-sections to be read? This section is analogous to section 33-C of the Industrial Disputes Act, 1947 and section 20 of the Industrial Disputes (Appellate Tribunal) Act, 1950. It is significant that in all the three statutes the cognate section is divided into two parts and the first part deals with recovery of 'money due' to a workman under an award and the second deals with a 'benefit' computable in terms of money. Under the first sub-section the State Government (or its delegate), if satisfied that any money is due, is enabled to issue a certificate to the Collector who then proceeds to recover the amount as an arrear of land revenue.

¹ (1960) 1 L.E.J. 336 : 1960 Ind. 130 : (1958) 2 M.L.J. (S.C.) 130 : (1958) M.L.J. 2. A.I.R. 1955 Patna 49 : 1955 Ind. 635 : A.I.R. 1958 S.C. 507.
³ (1958) S.C.J. 187 : (1958) M.L.J. (Cri.) 5 : (1962) 1 L.L.J. 334 : 92 : (1958) S.C.R. 442 : A.I.R. 1958 S.C. 12.
⁴ (1958) S.C.J. 844 : (1958) 2 An W.R. (S.C.) 5021 to 5010 : 1958 Ind. 130.

The second part then speaks of a benefit computable in terms of money which benefit after it is so computed by a tribunal is against recoverable in the same way as money due under the first part. This scheme runs through section 6-H, sub-sections (1) and (2).

That there is some difference between the two sub-sections is obvious enough. It arises from the fact that the benefit contemplated in the second sub-section is not "money due" but some advantage or perquisite which can be reckoned in terms of money. The Divisional Bench has given apt examples of benefits which are computable in terms of money, but till so computed are not "money due". For instance, loss of the benefit of free quarters is not loss of "money due" though such loss can be reckoned in terms of money by inquiry and equation. The contrast between "money due" on the one hand and a "benefit" which is not "money due" but which can become so after the money equivalent is determined on the other, marks out the areas of the operation of the two sub-sections. If the word "benefit" were taken to cover a case of mere arithmetical calculation of wages, the first sub-section would hardly have any play. Every case of calculation, however, simple, would have to go first before a Tribunal. In our judgment, a case such as the present, where the money due is back wages for the period of unemployment is covered by the first sub-section and not the second. No doubt some calculation enters the determination of the amount for which the certificate will eventually issue but this calculation is not of the type mentioned in the second sub-section and cannot be made to fit in the elaborate phrase "benefit which is capable of being computed in terms of money". The contrast in the two sub-sections between "money due" under the first sub-section and the necessity of reckoning the benefit in terms of money before the benefit becomes "money due" under the second sub-section shows that mere arithmetical calculations of the amount due are not required to be dealt with under the elaborate procedure of the second sub-section. The appellant no doubt conjured up a number of obstructions in the way of this simple calculation. These objections dealt with the "amount due" and they are being investigated because State Government must first satisfy itself that the amount claimed is in fact due. But the anti-thesis between "money due" and a "benefit which must be computed in terms of money" still remains, for the inquiry being made is not of the kind contemplated by the second sub-section but is one for the satisfaction of the State Government under the first sub-section. It is verification of the claim to money within the first sub-section and not determination in terms of money of the value of a benefit. The judgment of the Division Bench was thus right. The appeal fails and will be dismissed with costs. The companion appeal will also be dismissed but we make no order about costs in that appeal.

by V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, Chief Justice, K. N. WANCHOO AND S. M. SIKRI, JJ.

Lotus Line Private, Ltd.

*Appellant**

The State of Maharashtra

Respondent.

Tort—Damages—Damages to a jetty caused by the ship—Quantum of damages—Compensation for restoring to original condition—No complete reconstruction irrespective of damage done.

The true measure of damages to a person to whom a wrong is done, is full compensation for restoring the thing damaged to its original condition. This applies equally to a private person as to a corporation or trustee. But if by compensation or restitution is meant complete reconstruction irrespective of the damage done, then neither a private person nor a corporation or a trustee is entitled to complete reconstruction irrespective of the damages done.

Appeal from the Judgment and Decree dated the 1st October, 1959 of the Bombay High Court in First Appeal No. 697 of 1955.

Purushottam Tricumdas, Senior Advocate (*J. B. Dadachanji, O. C. Mathur and Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

T. V. R. Tatachari and R. N. Sachlthy, Advocates, for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—This appeal on a certificate granted by the Bombay High Court arises out of a suit brought by the State of Bombay (respondent) against the appellant for recovery of Rs. 24,979-2-4. The facts which led to the filing of the suit are not now in dispute as they have been concurrently found by the two Courts below and may be briefly narrated. On 27th April, 1948, at about mid-day, the vessel "Padam" belonging to the appellant arrived in the Dharamtar creek carrying a cargo of 3,500 bags of manure weighing about 250 tons and laid anchor alongside Dharamtar jetty lying on the Pen side of the creek on the Pen-Khopoli road. The Dharamtar jetty is meant for small vessels bringing passengers and luggage crossing the creek and so the peon on duty there requested the master of the ship to remove the vessel into the creek and to unload the cargo with the help of small boats. The master of the ship agreed to do so. But when he tried to move the vessel away from the jetty, she actually came on top of it due to the force of the ebb tide and got stuck there. The incident was reported by the peon to his superior officer who directed the peon to inform the master to refloat the vessel at night when there was high tide. The master did so at about 3 A.M. The consequence of the vessel getting on the jetty and the attempt to take it off was serious damage to the jetty, which was broken. This damage was found on the next day i.e., 28th April, 1948. An estimate for special repairs of the damage done was prepared soon after and was submitted on 12th May, 1948 to the Executive Engineer. The appellant was asked by telegram on 5th May, 1948 to send a representative in order that an estimate of the cost of special repairs for the damage done might be prepared. The appellant replied by telegram that a representative would be sent but no one appeared on behalf of the appellant when the estimate was prepared. This estimate was for Rs. 16,400. It appears that sometime thereafter emergent repairs costing Rs. 2,783 were undertaken to make the jetty workable. Later, some minor repairs costing about Rs. 1,223 were further carried out. In the meantime the appellant was asked again and again to pay for the damage done. The appellant refused to do so and therefore the State of Bombay filed the suit claiming the three sums mentioned above for special repairs, emergent repairs and minor repairs and also 6 per centum per annum interest thereon.

The trial Court found that the above facts had been established by the evidence led before it and that the appellant was liable to make good the loss as it arose on account of the negligence of the master of the ship. It then came to consider the quantum of damages. It came to the conclusion that the claim for Rs. 16,400 was really for reconstruction of the whole damaged area and this showed that the respondent-State wanted restitution and not compensation for the damage done. It however refused to give restitution on the ground that it had not been proved that special repairs to the extent of Rs. 16,400 were absolutely necessary for the damaged portion of the jetty. The trial Court also inspected the jetty and was of the opinion that the emergent and minor repairs that had been made had put the jetty in order and traffic was going on as usual. Further it took into account the statement of a witness that a bridge was being constructed over the Dharamtar creek and was likely to be completed within two years. It therefore finally gave a decree for Rs. 3,671-12-6 which had been actually spent by the State in making the repairs. The rest of the claim was dismissed.

This led to an appeal by the State before the High Court, and the only question which the High Court had to decide was the quantum of damages. In that con-

nection the High Court relied on *The Mayor, Wednesbury Corporation v. The Lodge Holes Colliery Co., Ltd.*¹ and held that that case laid down that the general rule was to require the party in the wrong to make compensation and not restitution, but there was an exception to this rule and that exception was where the party complaining of a wrong to property was a corporation or a trustee charged with the maintenance of a highway or other public work. In such a case the wrongdoer was bound to make restitution because a corporation or a trustee who was charged with the maintenance of public works was bound to restore the property in its or his possession to its original condition. On this view, the High Court allowed the appeal and modified the decree of the trial Court by awarding Rs. 19,038-8-0 and interest at 6 per centum from the date of suit till realisation. The present appeal on a certificate granted by the High Court challenges the principle laid down by the High Court, and it is urged that no such principle has been laid down in *Wednesbury Corporation's case*¹ and that that case was overruled in *Lodge Holes Colliery Co., Ltd. v. Mayor of Wednesbury*².

The only question that arises for decision before us therefore is the quantum of damages in a case like this. Apart from the fact that the case relied upon by the High Court has been partly over-ruled in the *Lodge Holes Colliery Co., Ltd.'s case*², we have been unable to find therein the principle which the High Court has deduced from the case of *Wednesbury Corporation*¹. Learned Counsel for the respondent-State is also unable to point out any passage in the judgment of Cozens-Hardy, L. J., which lays down the proposition in the form in which the High Court has stated it. As we read that case it lays down that the rights of a corporation in such a case are at least as high as that of a private owner, with this addition that a trustee or corporation cannot renounce those rights in the same way as a private owner could. The true measure of compensation was held in that case to be the cost of restoration and compensation must give full restoration. In that case the dispute really was whether the road which had subsided should be raised to the same level as it was before or whether the purpose would be served even though it was not raised to the same level and a dip was allowed therein. The Appeal Court held that the Corporation was entitled to full compensation for restoring the road to its original condition. It may be mentioned that this view was not accepted in full by the House of Lords. It seems to us however that the view taken in *Wednesbury Corporation's case*¹ that a person to whom a wrong is done is entitled to full compensation for restoring the thing damaged to its original condition may be accepted as the true measure of damages in a case of this kind. This applies equally to a private person as to a corporation or trustee. Therefore, the respondent-State was entitled to compensation to the extent necessary to restore the jetty to its original condition. If this is to be called restitution, the corporation as well as a private person would be entitled to it. But if by restitution, the High Court meant complete reconstruction irrespective of the damage done, then neither a private person nor a corporation or a trustee is entitled to complete reconstruction irrespective of the damage done.

This being the principle, the respondent-State would be entitled to such cost as would restore the jetty to its original condition. It is in that connection that an estimate was submitted for special repairs to the jetty as early as 12th May, 1948. The appellant was invited to send a representative to assess the cost of repairing the damage done but it neglected to do so. There is nothing on the record to show that the special repairs to the tune of Rs. 16,400 were for complete reconstruction of the jetty irrespective of the damage done to it. Nothing has been brought out in the evidence of Patel who prepared the estimate and of the Sub-Divisional Officer who supervised it to show that the estimate of Rs. 16,400 was for complete reconstruction of the jetty irrespective of the damage done. The covering letter to the estimate shows that it was an estimate for special repairs to the jetty. If the appellant neglected to send a representative to be present to assess the damage and the cost of repairing it, it cannot now come forward and say that the amount

1 L.R. (1907) 1 K.B. 78.

2 L.R. (1908) A.C. 323

of Rs. 16,400 would not be the proper sum required for restoring the jetty to its original condition. All that has been brought out in the evidence of the two witnesses referred to above is that it could not be said whether any part of the dismantled material was fit for re-use ; nor were the witnesses able to say what he dismantled material would have fetched if sold. Barring these two matters all that the evidence shows is that the amount of Rs. 16,400 was needed to carry out the special repairs, which would have presumably restored the jetty to its original condition. Therefore the respondent-State would be entitled to this sum of Rs. 16,400. But in view of the fact that some of the material might have been fit for re-use and some of the material might have been re-sold and thus fetched some price, we would deduct the item of Rs. 1,600 (from the total of Rs. 16,400) which refers to "dismantling the damaged portion and removing the debris outside including sorting materials and stacking the useful one to a suitable site, etc." The rest of the estimate amounting to Rs. 14,800 is clearly for restoration of the jetty to its original condition and the respondent-State would be entitled to that amount.

We may add however that there is no reason to allow anything to the respondent-State in the shape of emergent repairs. It has been shown that Rs. 14,800 would have restored the jetty to its original condition and that is all that the State is entitled to have. How it decided to spend that sum, whether at one time or at different times in the shape of emergent repairs or minor repairs, has no bearing on the quantum of compensation necessary for restoring the jetty to its original condition. For the same reason the fact that the State might not have spent the whole amount by the time the trial Court came to give its judgment or the fact that a bridge was going up and the jetty might not thereafter be required has no relevance on the question of damage done on 27th April, 1948, though the former may affect the date from which interest may be awarded. We are therefore of opinion that the respondent-State is entitled to Rs. 14,800 as compensation for the damage done to the jetty to put it back in its original condition. We therefore partly allow the appeal and reduce the amount decreed to Rs. 14,800. This sum will carry interest at the rate of Rs. 6 per cent. from the date of decree of the trial Court till realisation as ordered by the High Court. The appellant will pay proportionate costs throughout to the respondent-State.

V.S.

Appeal allowed in part.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO AND J. C. SHAH, JJ.

Brij Kishore and others

.. *Appellants**

v.

Vishwa Mitter Kapur and others

.. *Respondents.*

Delhi Rent Control Act (LIX of 1958), sections 14 (1), 57 (2)—Applicability of the new Act to pending proceedings under the prior Act of 1952—Suit for eviction of tenant on the ground of breach of conditions as to erections to leased premises—Removal of such unauthorised erections pending suit—Eviction of tenant if still obligatory—Existence of power to relieve under the prior Act—Clarified and modified slightly in the new Act—Relief under the new Act available to tenant.

The appeals to the Supreme Court arose out of suits for ejectment filed by the landlord against the tenant under section 13 (1) Proviso clause (k) of the Delhi Rent Control Act of 1952 on the ground that the tenant, contrary to the conditions, erected unauthorised structures to the leased premises. During the pendency of the suit the tenant had removed the offending structures. Meanwhile the 1958 Delhi Rent Control Act was passed, section 57 (2) of which dealt with the applicability of the new Act to the pending actions. Section 14 (1) of the Act of 1958 (there was no similar provision in the 1952 Act) forbade eviction of the tenant in case he complied with the condition within the time granted. On the question of the applicability of this enabling provision to proceedings pending under the old Act,

Held : The provisions of section 14 (11) of the Act of 1958 relieving against eviction in case of compliance with the condition would be applicable to pending proceedings under the 1952 Act.

The decision in *Karamsingh's case* reported in A.I.R. 1964 S.C. 1305 laid down that where in the present Act there is a radical departure from the 1952 Act, the 1952 Act will continue to apply to pending proceedings ; but where the present Act had slightly modified or clarified the previous provisions these modifications and clarifications should be applied.

It is true that section 114-A of the Transfer of Property Act would not in specific terms apply to the proceedings ; but ejection on the ground specified in clause (k) to the Proviso to section 13 (1) of the 1952 Act was somewhat analogous to forfeiture on breach of an express condition of a lease for it also required previous notice to the tenant before the suit is filed. It cannot be said that the 1952 Act forbade the Court from granting relief when the offending structures were removed by the tenant even during the pendency of the suit for ejection, within a reasonable time. Therefore when section 14 (11) of the Act of 1958 gave power to the Controller to give relief to the tenant under conditions mentioned therein it was in fact clarifying what the Court could do under the 1952 Act on the analogy of section 114-A of the Transfer of Property Act and also modifying it slightly. The provisions of section 14 (11) would be applicable to pending proceedings initiated under clause (k) to the Proviso to section 13 (1) of the 1952 Act.

Appeals by Special Leave from the Judgments and Decrees dated 18th January, 1961 and 13th December, 1960 of the Punjab High Court Circuit Bench at Delhi, in Civil Revision No. 13-D of 1958 and Civil Revision Case No. 592-D of 1957.

M. S. K. Sastri and *M. S. Narsasimhan*, Advocates, for Appellant (In C.A. No. 121 of 1963).

M. G. Setalvad, Senior Advocate (*S. Murty* and *B. P. Maheshwari*, Advocates, with him), for Appellants (In C.A. No. 879 of 1962 and Respondents In C.A. No. 121 of 1963).

Raghubir Singh, Senior Advocate (*M. I. Khowaja*, Advocate with him), for Respondent (In C.A. No. 879 of 1962).

The Judgment of the Court was delivered by :

Wanchoo, J. :—These two appeals by Special Leave from two judgments of the Punjab High Court raise a common question with respect to the application of the First Proviso to section 57 (2) of the Delhi Rent Control Act LIX of 1958 (hereinafter referred to as the present Act). They arise from decisions of two learned Single Judges in revision applications under the Delhi and Ajmer Rent Control Act XXXVIII of 1952 (hereinafter referred to as the 1952 Act). In one of them (C.A. No. 879) the learned Judge has held that in view of the First Proviso to section 57 (2), a decree for ejection against the tenant could not be passed. In the other appeal (No. 121), the other learned Judge has held that the tenant is liable to ejection in spite of the First Proviso to section 57 (2) of the present Act. It will thus be seen that the two decisions are contradictory and raise the question as to when the First Proviso to section 57 (2) precisely applies to facts similar to the facts in the present two appeals which are more or less the same.

Before we consider the question thus raised before us, we may briefly indicate the facts in the two appeals. In Appeal No. 879 of 1962 the landlord sued for ejection on the ground that the tenant had erected certain structures in the shape of closing an open verandah and erecting a partition therein. On account of this, notices were sent to the landlord as well as to the tenant by the authorities concerned to remove the unauthorised structures. As however the tenant did not do so, suit for ejection was filed by the landlord under clause (k) to the proviso to section 13 (1) of the 1952 Act, which ran as follows :—

" 13. (1) Notwithstanding anything to the contrary contained in any other law or any contract, no decree or order for the recovery of possession of any premises shall be passed by any Court in favour of the landlord against any tenant (including a tenant whose tenancy is terminated) :

Provided that nothing in this sub-section shall apply to any suit or other proceeding for such recovery of possession if the Court is satisfied—

* * * * *

(k) that the tenant has, whether before or after the commencement of this Act, "caused or permitted to be caused substantial damage to the premises, or notwithstanding previous notice has used or dealt with the premises in a manner contrary to any condition imposed on the landlord by the Government or the Delhi Improvement Trust while giving him a lease of the land on which the premises are situated."

The lease in favour of the landlord by the Government provided that

"the lessee will not without the previous consent in writing of the Chief Commissioner of Delhi or such officer or body as the lessor or the Chief Commissioner of Delhi may authorise in this behalf erect or suffer to be erected on any part of the said demised premises any buildings other than and except the buildings erected thereon at the date of these presents."

The case of the landlord was that the tenant had made structures without authority which made him liable to ejection under clause (k). During the pendency of the suit, however, the tenant had removed the offending structures with the result that there was no longer any breach of the condition of the lease.

In C.A. No. 121 of 1963, also the facts were similar and the suit was filed on the basis of clause (k) of Proviso to section 13 (1) of the 1952 Act. In this case also the tenant had closed the verandah without the permission of the authorities concerned and notice was given to the landlord on that count by the authorities and the landlord in his turn asked the tenant to remove the unauthorised structure. When the tenant did not do so, the landlord filed the suit. It appears that during the trial of the suit, the tenant made certain changes in the structure and removed the glazing and instead he closed the verandah with wire-gauze net. It was stated by a witness from the office of the Land Development Officer that the fixing of wire-gauze net was not against the clause as to unauthorised construction which was the same in the case of this lease as in the case of the lease in the other appeal. It may be added that no further action has been taken by the Land Development Officer after removal of the glazing and after fixing of the wire-gauze net.

In the circumstances the question that arose for decision in both the cases was whether the tenant could still be ejected after he had removed the unauthorised structure and there was no further danger to the landlord's lease being forfeited and in that connection the application of the First Proviso to section 57 (2) of the present Act arose. As we have already indicated, one of the learned Judges held that the tenant could be ejected while the other held that he could not.

In order to decide the point that has been raised before us it is necessary to set out the corresponding section in the present Act which is section 14. The relevant part of this section is in these terms :—

"14. (1) Notwithstanding anything to the contrary contained in any other law or contract no order or decree for the recovery of possession of any premises shall be made by any Court or Controller in favour of the landlord against a tenant :

Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds only, namely :—

* * * * *

(k) that the tenant has, notwithstanding previous notice, used or dealt with the premises in a manner contrary to any condition imposed on the landlord by the Government or the Delhi Development Authority or the Municipal Corporation of Delhi while giving him a lease of the land on which the premises are situate ;

"14. (1) No order for the recovery of possession of any premises shall be made on the ground specified in clause (k) of the Proviso to sub-section (1), if the tenant, within such time as may be specified in this behalf by the Controller, complies with the condition imposed on the landlord by any of the authorities referred to in that clause or pays to that authority such amount by way of compensation as the Controller may direct."

Section 57 (1) repeals the 1952 Act. Section 57 (2) which is material for our purpose reads thus :—

"57. (2) Notwithstanding such repeal, all suits and other proceedings under the said Act pending, at the commencement of this Act, before any Court or other authority shall be continued and disposed of in accordance with the provisions of the said Act, as if the said Act had continued in force and this Act had not been passed ;

Provided that in any such suit or proceeding for the fixation of standard rent or for the eviction of a tenant from any premises to which section 54 does not apply, the Court or other authority shall have regard to the provisions of this Act.

* * * * *

It will be seen from a comparison of the 1952 Act and the present Act with respect to ejectment on the ground contained in clause (k) of the First Proviso that there are some differences in the language of the Proviso to section 13 (1) of the 1952 Act and of the Proviso to section 14 (1) of the present Act. In the first place the Proviso to section 13 (1) of the 1952 Act lays down that nothing in sub-section (1) shall apply to any suit or other proceeding for such recovery of possession while the Proviso to section 14 (1) lays down that the Controller may on an application made to him make an order for the recovery of possession of the premises on one or more of the grounds specified. The first difference is that the forum is changed from the civil Court to the Controller ; but that is a question of jurisdiction which we need not consider here. The second difference is that while under the 1952 Act the language of the Proviso was imperative and laid down that nothing in the Act applied when the various clauses of the Proviso were satisfied, the language of the Proviso to section 14 (1) of the present Act is not so imperative. Even so, we are of opinion that there is no difference in substance, for where the requirements of the Proviso are satisfied under the present Act the Controller has to pass a decree for ejectment unless there is provision otherwise in section 14 which will be found with reference to various clauses in the Proviso as for example section 14 (2), 14 (10) and 14 (11). Another difference for our purposes between section 13 of the 1952 Act and section 14 of the present Act is the introduction of sub-section (11) of section 14 in the present Act while there was nothing in the 1952 Act corresponding to it. The main argument on behalf of the landlords in the two cases is based on this difference between the two Acts and it is contended that the introduction of sub-section (11) is a radical departure and therefore the language of the First Proviso to section 57 (2) would not apply to the present situation.

Now the First Proviso to section 57 (2) came up for interpretation before this Court in *Karam Singh v. Sri Pratap Chand*¹. In that case the majority held that the Proviso must be read harmoniously with the substantive provision contained in sub-section (2) and the only way of harmonising the two was to read the expression "shall have regard to the provisions of this Act" as merely meaning that where the new Act has slightly modified or clarified the previous provisions, these modifications and clarifications should be applied. It was further held that these words did not take away what was provided by sub-section (2) and that ordinarily the old Act would apply to pending proceedings. In substance therefore *Karam Singh's case*¹, decided that where in the present Act there is a radical departure from the 1952 Act, the 1952 Act will continue to apply to pending proceedings, but where the present Act had slightly modified or clarified the previous provisions these modifications and clarifications should be applied.

The question that falls for consideration in the present appeals therefore is whether the addition of sub-section (11) in section 14 is a radical departure from what section 13 (1) provided or whether it is a clarification and/or modification of the previous provision. Whether sub-section (11) is a clarification and/or modification of the position as existed when the 1952 Act was in force would depend upon whether when that Act was in force it was open to a Court to give relief to a tenant where the offending structure had been removed by him during the pendency of the suit. In this connection section 114-A of the Transfer of Property Act (IV of 1882) may be referred to. Section 114-A runs as follows :—

"114-A. *Relief against forfeiture in certain other cases.*—Where a lease of immovable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

- (a) specifying the particular breach complained of ; and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach ,

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy. Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent."

It will be seen that section 114-A gives power to Court to give relief to the tenant against forfeiture where it holds that the landlord did not give reasonable time to the tenant to remedy the breach. In such case it can dismiss the suit as not maintainable. It is true that section 114-A would not in specific terms apply to cases like the present; but ejection on the ground specified in clause (k) to the Proviso to section 13 (1) of the 1952 Act was somewhat analogous to forfeiture on breach of an express condition of a lease for it also required previous notice to the tenant before the suit is filed (see *Uma Kumari v. Jaswant Rai Chopra*)¹. We do not think that it can be said that the 1952 Act forbade the Court from granting relief where the offending structures were removed by the tenant even during the pendency of the suit for ejection. What is reasonable time within which the breach should be remedied is always a question of fact and we think it would have been possible for the Court in a suit based on clause (k) of the Proviso to section 13 (1) to give relief against forfeiture in a proper case where the tenant had removed the offending structure before the suit was filed or even during the pendency of the suit if reasonable time was not allowed in the notice contemplated by clause (k) of the Proviso to section 13 (1). On the interpretation pressed before us on behalf of the landlords in the two appeals it is argued that once the breach has been committed by the tenant by making an unauthorised structure he is liable to ejection even though the landlord may never have given him notice about the breach and may not even have required him to remove it and that his liability to ejection would continue even if he had removed the offending structure before the filing of the suit. We do not think that such an interpretation can be given to the provisions of an ameliorating statute like the 1952 Act, when it is clear that even under section 114-A of the Transfer of Property Act, the Court has power to give relief against forfeiture in the circumstances mentioned above. We are therefore of opinion that even under the 1952 Act it would have been open to a Court to give relief to the tenant who had remedied the breach either before the suit was filed or even after the suit had been filed depending upon what the Court considered to be reasonable time. Therefore when sub-section (11) gave power to the Controller to give relief to the tenant under conditions mentioned therein it was in fact clarifying what the Court could do under the 1952 Act on the analogy of section 114-A of the Transfer of Property Act and also modifying it slightly. Incidentally we may add that the addition of sub-sections (10) and (11) may explain the change in the form of the language of the Proviso to section 14 (1) of the present Act to which we have already referred. We are therefore of opinion that the introduction of sub-section (11) in section 14 was clarificatory and slightly modificatory of the power of the Court under the 1952 Act to relieve against forfeiture where the suit was brought without giving the tenant reasonable time in the notice contemplated in clause (k) of the Proviso to section 13 (1). In this view C.A. No. 879 of 1962 must fail and is hereby dismissed. C.A. No. 121 of 1963 succeeds and is hereby allowed and the plaintiff-respondents' suit is dismissed. As in both these cases the tenant has succeeded mainly on account of some change in law after the suit had been filed, we order parties to bear their own costs throughout in both the appeals.

V.S.

*C.A. No. 121 of 1963 allowed;
C.A. No. 879 of 1962 dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH, J. R. MUDHOLKAR
AND S. M. SIKRI, JJ.

Chittarmal

.. Petitioner*

v.

Shah Pannalal Chandulal

.. Respondent.

Constitution of India, 1950, Article 133, clauses (a) and (b)—Appeal in civil matter from the judgment of the High Court to Supreme Court—Pecuniary value—Amount or value of the subject-matter in the Court of first instance and “still in dispute” falls under clause (a)—Claim or question respecting property of the requisite pecuniary value in addition to or other than the subject-matter of the dispute falls under clause (b)—Claim to money (less than Rs. 20,000) alleged to be due from an agent for price of property belonging to principal sold by agent—No claim or question respecting property sold involved directly or indirectly—No leave to appeal.

The variation in the language used in clauses (a) and (b) of Article 133 of the Constitution pointedly highlights the conditions which attract the application of the two clauses. Under clause (a) what is decisive is the amount or value of the subject-matter in the Court of first instance and “still in dispute” in appeal to the Supreme Court; under clause (b) it is the amount or value of the property respecting which a claim or question is involved in the judgment sought to be appealed from. The expression “property” is not defined in the Code, but having regard to the use of the expression “amount” it would apparently include money. But the property respecting which the claim or question arises must be property in addition to or other than the subject-matter of the dispute.

If in a proposed appeal there is no claim or question raised respecting property other than the subject-matter clause (a) will apply; if there is involved in the appeal a claim or question respecting property of an amount or value not less than Rs. 20,000 in addition to or other than the subject-matter of the dispute clause (b) will apply.

It cannot be said that a judgment dealing with a claim to money alleged to be due from an agent for price of property belonging to the principal sold by the agent either directly or indirectly involves a claim or question respecting property which is sold. The claim in the Court of first instance did not reach Rs. 20,000 and clause (a) of the Article did not apply. Though the claim of the appellant on appeal exceeds Rs. 20,000 by the addition of interest, this is still the subject-matter in dispute and the judgment does not involve any claim or question respecting property in addition to or other than the subject-matter of the suit.

Petition for Special Leave to appeal to the Supreme Court from the Judgment and Decree dated the 16th December, 1963 of the Rajasthan High Court in Civil First Appeal No. 54 of 1956.

Mukat Behari Lal Bhargava, Senior Advocate; (*Zalim Singh Meeratwal* and *Naunil Lal*, Advocates, with him), for Petitioner.

M. C. Setalvad, Senior Advocate (*I. N. Shroff*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The petitioner applies for Special Leave to appeal under Article 136 of the Constitution, against the judgment of the High Court of Rajasthan dated 16th December, 1963 in Civil First Appeal No. 54 of 1956 on two grounds :

(1) that the judgment of the High Court involves a claim or question respecting property of not less than Rs. 20,000 in value, and the High Court erred in refusing a certificate under Article 133 (1) (b) of the Constitution; and

(2) that the case is otherwise fit for appeal to the Supreme Court.

The material facts bearing on the plea raised are these. The petitioner commenced on 2nd July, 1951, in the Court of the Subordinate Judge, First Class, Ahmer, an action against the respondents claiming a decree for Rs. 10,665 and for rendition of accounts in respect of the balance of sale proceeds of 104 bales of cotton purchased by him through the agency of the respondents. The petitioner claimed that 104 bales of cotton purchased by him were sold by the respondents as his agents on 14th May, 1948 for Rs. 27,267-13-6 and without settling the account the respondents delivered towards that amount a demand draft for Rs. 11,000 which was encashed and four cheques of the aggregate value of Rs. 13,000 which because of lack of arrangement with the respondents' bankers were not encashed, and the petitioner on that account was entitled to receive from the respondents Rs. 10,665 being the amount due on the foot of dishonoured cheques and interest thereon at the rate of 6 per cent. per annum between 2nd July, 1947 to 1st July, 1951, less Rs. 4,000 subsequently received by him. The petitioner also claimed a decree for the balance of the price after giving credit for commission, *dalali* and godown charges incurred by the respondents as his agents and as he was not in a "position to know" the amounts due to or disbursed by the respondents, he claimed a decree for rendition of account. The subject-matter of the suit was, therefore, a claim for Rs. 10,665 due to the petitioner on a cause of action arising on cheques dishonoured, and a claim for the balance of the price due as may be ascertained on taking accounts.

The trial Court passed a decree directing that account be taken for ascertaining the amount due in respect of the entire transaction of 104 bales and for taking accounts appointed a Commissioner. The High Court of Rajasthan reversed the decree passed by the trial Court and dismissed the suit, holding that the transactions in respect of which the claim was made by the petitioner were those of an unregistered firm constituted by the petitioner and another person named Duli Chand and the suit was barred because the firm was not registered. An application filed by the petitioner for certificate under Article 133 of the Constitution was rejected by the High Court.

The judgment of the High Court proceeds entirely upon appreciation of evidence and on the findings recorded the petitioner's suit must stand dismissed. But Counsel for the petitioner urged that the judgment of the High Court directly involves a claim or question respecting property of value not less than Rs. 20,000 and he was entitled as a matter of right to a certificate from the High Court under Article 133 (1) (b) of the Constitution. This argument is sought to be presented in two ways. It is urged in the first instance that the judgment of the High Court involves a question relating to the right of the petitioner respecting 104 bales of cotton belonging to him and sold by the respondents for an amount exceeding Rs. 27,000. Secondly, it is urged that pursuant to the order of the trial Court a Commissioner was appointed and the Commissioner reported that Rs. 12,089-14-6 with interest at the rate of 6 per cent. per annum from 14th May, 1948, were due to the petitioner and as the amount due to the petitioner on that footing was not less than Rs. 20,000 at the date of the decree of the High Court, the judgment of the High Court involved a claim respecting property of that amount or value. In our view the contention raised by the petitioner under either head has no substance.

It is conceded, and in our judgment Counsel is right in so conceding, that the petitioner could not seek a certificate under clause (a) of Article 133 (1). The claim in the Court of first instance did not reach Rs. 20,000 and one of the conditions for a certificate under that clause being absent, the claim could not be maintained. To attract the application of Article 133 (1) (b) it is essential that there must be—omitting from consideration other conditions not material—a judgment involving directly or indirectly some claim or question respecting property of an amount or value not less than Rs. 20,000. The variation in the language used in clauses (a) and (b) of Article 133 pointedly highlights the conditions which attract the application of the two clauses. Under clause (a) what is decisive is the amount or value of the subject-matter in the Court of first instance and "still in dispute" in appeal to the Supreme Court: under clause (b) it is the amount or value of the property

respecting which a claim or question is involved in the judgment sought to be appealed from. The expression "property" is not defined in the Code, but having regard to the use of the expression "amount" it would apparently include money. But the property respecting which the claim or question arises must be property in addition to or other than the subject-matter of the dispute. If in a proposed appeal there is no claim or question raised respecting property other than the subject-matter clause (a) will apply; if there is involved in the appeal a claim or question respecting property of an amount or value not less than Rs. 20,000 in addition to or other than the subject-matter of the dispute clause (b) will apply.

In the present case the subject-matter in dispute was a claim for money. A part of that claim was definite and the rest was to be ascertained on taking accounts. The judgment did not involve any claim or question relating to property in addition to or other than the subject-matter in dispute of the value of Rs. 20,000. It was admitted by the petitioner in his plaint that the bales of cotton were sold by the respondents as his agents. The right of the respondents to sell the bales was not in dispute. What was challenged was the right of the respondents to retain the price received by them. It cannot be said that a judgment dealing with a claim to money alleged to be due from an agent for price of property belonging to the principal sold by the agent either directly or indirectly involves a claim or question respecting property which is sold.

Nor does the alternative ground assist the petitioner. It is true that by his petition the petitioner claims restoration of the decree of the trial Court, and by adding interest at the rate of 6 per cent. per annum to the petitioner's claim as awarded under the report of the Commissioner, the claim of the petitioner on appeal exceeds Rs. 20,000. But this is still the subject-matter in dispute and the judgment does not involve any claim or question respecting property in addition to or other than the subject-matter of the suit.

The petition therefore fails and is dismissed with costs.

V.S.

Petition dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, M. HIDAYATULLAH, J. C. SHAH, S. M. SIKRI AND R. S. BACHAWAT, JJ.

M/s. Patnaik & Company

.. *Appellants**

v.

The State of Orissa

.. *Respondent.*

Sales Tax—Orissa Sales Tax Act (XIV of 1947)—Contract for sale of goods and contract for work and labour—Distinction and tests—Contract for bus body building—Nature of.

A contract for the sale of goods to be manufactured does not cease to be a contract for sale of goods merely because the process of manufacture is supervised by the purchaser. A contract for supply of bus bodies to be built under the specifications prescribed by the purchaser and fixed on chassis supplied by the purchaser for a fixed price is one for the sale of specific goods and not a works contract.

Per Shah, J. (contra):—The contract in the instant case is one for work and not a contract for sale, because the contract is not that the parties agreed that the "bus body" constructed by the appellants shall be sold to the purchaser (the State of Orissa). The contract is one in which the appellants agreed to construct "bus bodies" on the chassis supplied to them as bailees and such a contract being one for work, the consideration paid is not taxable under the Orissa Sales Tax Act.

Appeals by Special Leave from the Judgment and Order dated 21st August, 1962 of the Orissa High Court in S.J.C. No. 28 of 1961.

A. F. Viswanatha Sastri, Senior Advocate (R. Gopalakrishnan, Advocate, with him), for Appellants (In all the Appeals).

M. C. Setalvad, Senior Advocate (*R. Ganapathy Iyer* and *R. N. Sachithy*, Advocates, with him), for Respondent (In all the Appeals).

The Court delivered the following Judgments :

Shah, J.—Whether a contract is one for execution of work or for performance of service, or is a contract for sale of goods must depend upon the intention of the parties gathered from the terms of the contract viewed in the light of surrounding circumstances. If the contract is one for work or for performance of service, the mere circumstance that the party doing the work or performing the service uses goods or materials belonging to him in the execution of the contract will not be of any importance in determining whether the contract is one for sale of goods. It is common ground that under the scheme of the Sales Tax Acts enacted by State Legislatures, if in its true nature the contract is one for performance of service or for work, consideration paid is not taxable, for the States have authority under the Constitution by Schedule VII to legislate on the topics of tax on sale or purchase of goods (other than newspapers) and have no power to tax remuneration received under contracts for work or service. The primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing work or rendering service no property in the thing produced as a whole notwithstanding that a part or even the whole of the materials used by him may have been his property. In the case of a contract for sale, there is in the first instance a chattel which belongs exclusively to a party and under the contract property therein passes for money consideration. As observed in Halsbury's Laws of England (Third Edition), Vol. 34, pp. 6-7, Para. 3 :

"A contract of sale of goods must be distinguished from a contract for work and labour. The distinction is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession, of a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel *qua* chattel the contract is one for work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale ; neither the ownership of the materials nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel."

To constitute a sale there must therefore be an agreement and in performance of the agreement property belonging to one party must stand transferred to the other party for money consideration. Mere transfer of property in goods used in the performance of a contract is, however, not sufficient ; to constitute a sale there must be an agreement—express or implied—relating to sale of goods and completion of the agreement by passing of title in the very goods contracted to be sold. It is of the essence of the transaction that the agreement and sale should relate to the same subject-matter, *i.e.*, the goods agreed to be sold and in which the property is transferred.

To determine the liability of the appellants to pay tax under the Orissa Sales Tax Act on the consideration received by them under the terms of the contract, the true intention of the parties must be determined. The agreement which is the subject-matter of the dispute between the parties is executed on behalf of the Governor of Orissa and the appellants, for constructing "bus bodies" on the chassis supplied by the Governor of Orissa. In the second paragraph of the preamble it is recited that the Governor had accepted the quotation and had decided to place orders for construction of "bus bodies" on the chassis supplied by the Governor at the rates specified therein. The third paragraph recites that the appellants had agreed to construct "bus bodies" at the rate quoted and on the terms and conditions recited therein. The agreement then proceeds to set out the conditions of the contract. By the first condition the appellants are made responsible for safe custody of the chassis from the date of receipt thereof from the Governor till delivery and are bound to insure their premises including the chassis against fire, theft, damage and riot at their own cost. By that condition the appellants are made "responsible for the chassis and materials supplied" to them and have

undertaken to indemnify the Governor for any loss or damage to the said material. The clause also provides that the completed "bus bodies" shall be delivered to the Governor on or before the dates specified in the agreement. By clause 2 it is stipulated that the "bus bodies" shall be constructed in the most substantial and workmanlike manner, both as regards materials and otherwise in every respect in strict accordance with the specifications in Schedule 'B' of the agreement. Clause 3 provides for payment for additional work as may be directed by the Transport Controller under an order in writing to that effect. By clause 4 it is provided that the appellants shall guarantee the durability of the body for two years from the date of delivery and if any imperfection or defective material becomes apparent within the period of guarantee the appellants shall rectify the defects at their own cost.

These four clauses do not indicate any clear intention as to the nature of the contract; they are consistent with the contract being one for sale of "bus bodies" belonging to the appellants as well as to a contract for building bus bodies on chassis supplied. Liability imposed by the contract requiring the appellants to indemnify the Governor for loss or damage to the chassis supplied and liability to carry out the work in the most substantial and workmanlike manner and to guarantee durability of the bodies are consistent with the contract being one of sale or of work and service. Clause 3 also does not indicate any definite intention. If the contract is one for sale of a "bus body", the agreement to pay extra payment for additional work to be done thereon is not also indicative of any definite intention. But by clauses 5 and 6 of the contract a definite intention that the contract is one for work and not sale is, in my judgment, indicated. By the fifth clause it is, *inter alia*, provided that the work shall throughout the stipulated period of the contract be carried out with all due diligence, time being deemed to be of the essence of the contract, and that the appellants shall be liable to pay to the Governor as liquidated damages an amount equal to 50 per cent. of the estimated cost of the whole work as shown in the contract for every day that the work remains unfinished after the date fixed. In a contract for sale of goods such a covenant is unusual. If a party to a contract fails to carry out his part within the period specified, unless the other party waives the breach the contract may be deemed to be broken. The other party is ordinarily not concerned with the method or manner of producing the chattel agreed to be sold, if the specifications relating thereto are otherwise complied with. Imposition of an obligation to carry out the work with due diligence is indicative of the contract being one for work. This inference is strengthened by the proviso to clause 5 which imposes liability upon the appellants to pay damages until the defects detected on inspection are rectified. By the first part of clause 6, all work under or in the course of execution or executed in pursuance of the contract shall at all times be open to inspection by the Controller or officers authorised by him in that behalf and they shall have the right to stop by a written order any work which in the opinion of the Controller has been executed with unsound, imperfect, unskilful or bad workmanship or with materials of inferior quality. The appellants on receipt of a written order are obliged to dismantle or replace such defective work or material at their own cost. If the appellants fail to comply with the order within seven days from the date of receipt of the order, the Controller is free to get the work remaining to be done by any other agency and is entitled to recover the difference in cost from the appellants, and for this purpose the Controller is at liberty to enter upon the premises of the appellants and take delivery of the unfinished vehicles. It is clear from the terms of clause 6 that throughout the process of construction the appellants are under the supervision of the Controller, and it is open to the Controller to stop any work which is in progress and to call upon the appellants to rectify the work by dismantling or replacing the defective work. If the appellants fail to carry out the order of the Controller it is open to the Controller to take possession of the unfinished work and get the same done through any other agency and to recover the difference in cost from the appellants. The Controller is also given liberty to enter upon the premises of the appellants and to take over the unfinished vehicles. A party agreeing to purchase goods of certain specifications or description is entitled to insist that the specifications or the description shall be strictly carried

out, but he has ordinarily no right to supervise the production of the goods. Again the right which is conferred upon the Controller to take away the unfinished vehicles and to get them completed by some other agency is wholly inconsistent with the contract being one for purchasing an article belonging to the appellants. What one may ask would be the authority of the Controller under a contract of sale to take away unfinished vehicles from the person who owns them, have the work completed by another person and then to claim the right to recover the difference in cost? Paragraph 7 deals with the right to recover the consideration agreed to be paid to the appellants and the time at which it is to be paid. Paragraph 8 deals with the place at which the completed vehicles with bodies built thereon are to be delivered and till the date of the delivery the risk is with the appellants. Paragraph 9 deals with the settlement of any dispute which may arise between the parties on any question relating to the meaning of the specifications and drawings or as to the quality of the workmanship or materials used in the work. Paragraph 10 deals with the jurisdiction of Courts in the event of a dispute between the parties. Paragraphs 7 to 10 are in their content neutral and may be consistent with the agreement being either one for sale or for work or service.

Schedule 'B' consists of the specifications for construction of the composite bodies. They set out the designs and the specifications of the underframe and floor, framework, roof, panelling, side windows, doors, seats, driver's can, roof lamps, grab rails, window guard rails, wind screens, luggage carriers, finish and miscellaneous fittings. It is true that the specifications contemplated that the appellants had to supply certain goods which are not fixed to the "bus bodies". There are also provisions for supply of additional equipment such as wind screen wipers, locking arrangements, boxes for first aid equipment and complaint book. It is not, however, the case of the parties that the contract is a composite contract. It is part of a single contract that the "bus body" to be constructed has to conform to the specifications and in the manufacture of the completed bus body the equipment set out under the head 'miscellaneous fittings' and elsewhere has to be provided.

An elaborate argument was advanced before us by Counsel for the State of Orissa suggesting that the "bus bodies" are separately built and are thereafter fixed to the chassis supplied by the State. The argument, however, does not appear to be correct in view of clauses 3, 4, 5, 6, 7, 8 and 9 of the specifications. Again the right which is conferred by clause 6 of the main agreement which enables the Controller to take possession of the unfinished vehicles indicates that the bodies were to be built on the chassis supplied and they were not to be independently constructed. But this has, in my view, no decisive bearing. The parties may contract that on the chassis supplied by the State a body shall be built. If the true intention of the parties is that a body is a chattel belonging to the builder and the property therein is to pass under a contract against price, it would be a contract for sale of the body notwithstanding the fact that it is built on the chassis.

Another question to which Counsel devoted considerable argument was whether the maxim '*quicquid fixatur solo, solo cedit*' which is a rule of the Common Law of England is applicable under the Indian system to accretions to movables. Under the English Common Law a house which is constructed being embedded in the land becomes an accretion to the land and (subject to mass of exceptions in favour of tenants and in favour of trade fixtures) belongs to the person to whom the land belongs. But that rule has not been accepted in India: *Thakoor Chunder Poramanick v. Ram Dhonde Bhuttacharji*¹ and *Narayan Das Khetry v. Jalindra Nath Roy Chowdhury*. It is unnecessary to advert to the contention whether the rule applies to accretions to movables, for ultimately the true effect of an accretion made pursuant to a contract has to be judged, not by any artificial rule that the accretion may be deemed to have become by virtue of affixing to a chattel part of that chattel.

1. 6 Suth. Weekly Reports 228.

2. (1926) 53 M.L.J. 158 : L.R. 54 I.A. 218 :

intention of the parties to the contract. In each case the Court must ascertain what the intention of the parties was when property in goods belonging to one person and affixed to the property of another person passed to that other person. Whether pursuant to a contract, any movables are fixed to another movable the property passes immediately to the person to whom the primary property belongs must depend upon the intention of the parties.

One strong test to ascertain whether a given contract is for work or for sale of goods is to ascertain whether the thing produced as a whole had individual existence as the sole property of the party who produced it at some time before delivery, and the property therein passes only under the contract relating thereto to the other party for price. If the thing has no individual existence as the sole property of the party producing it, the contract will be one for work or for service.

Under condition 6 of the contract unfinished goods may be taken possession of by the Controller and appropriated to himself notwithstanding the objections which the appellants may have to that course. If the chassis and the body were destroyed before delivery, as stipulated loss of the body would undoubtedly fall upon the appellants, for by clause 1 of the agreement the appellants are bound to indemnify the State of Orissa for any loss that may be suffered by the State. But this covenant is not decisive of the true nature of the contract. A bailee of goods under a works contract may undertake a more onerous liability than what is prescribed by section 151 of the Contract Act see section 152, Contract Act. Undoubtedly before delivery of a complete chassis with "bus body" under the terms of the contract the appellants have no right to claim the consideration agreed to be paid to them. If, because of the loss of the chassis and the "bus body" constructed by the appellants, the appellants are unable to deliver the vehicle, the liability to indemnify the State for loss of the chassis arises by express terms of the contract and their claim for recovery of the value of the materials used or the consideration agreed to be paid would fail, because they have failed to carry out their part of the contract.

It is unnecessary to refer to the large number of authorities to which our attention was invited by Counsel. The question must be decided on a true interpretation of the terms of the contract in the light of surrounding circumstances. If, on a review of all the terms of the contract, it appears that the intention of the parties was that the appellants were to sell "bus bodies" to the State of Orissa the contract would clearly be one for sale and consideration paid would be taxable under the Orissa Sales Tax Act. If, however, the contract is one for securing a certain result namely the building of a body on the chassis supplied by the State with the materials belonging to the appellants, the contract would be one for work done and not liable to sales tax.

In my view the present contract is one for work and not a contract for sale, because the contract is not that the parties agreed that the "bus body" constructed by the appellants shall be sold to the State of Orissa. The contract is one in which the appellants agreed to construct "bus bodies" on the chassis supplied to them as bailees and such a contract being one for work, the consideration paid is not taxable under the Orissa Sales Tax Act.

In my view therefore the appeal should be allowed.

Sikri, J. (on behalf of the majority).—These three appeals by Special Leave are directed against the judgment of the Orissa High Court in three References made by the Orissa Sales Tax Tribunal under section 24 (1) of the Orissa Sales Tax Act, 1947, in respect of assessments for three quarters ending 30th June, 1957, 30th September, 1957 and 31st December, 1957. All these appeals raise a common question of law and it would be sufficient if facts relating to the assessment for the quarter ending 30th June, 1957 alone are given.

For the quarter ending 30th June, 1957, the appellant, Messrs. Patnaik & Co, claimed to deduct from their gross turnover receipts totalling Rs 11,268 45 received from the State Government of Orissa for building bodies on the chassis supplied by

the Government, during the quarter. The Sales Tax Officer refused to deduct this amount. On appeal, this claim was allowed by the Collector of Sales Tax, purporting to follow an earlier decision of the Orissa Sales Tax Tribunal. The Department appealed against this order to the Sales Tax Tribunal which, by its order dated 2nd June, 1961, affirmed the order of the Collector. The Tribunal, in brief, held that it was impossible to spell out a distinct and separate contract to sell any materials or chattels to the customers in the work of construction of the bodies on the chassis. On the application of the Department, the Sales Tax Tribunal referred to the High Court the following question :

"Whether in the facts and circumstances of the case, the Tribunal is right in holding that the amounts received by the opposite party on the construction of bodies on chassis supplied by its customers under written contracts are not chargeable to the Orissa sales tax ?"

The High Court, in a short order, following its decision in *The Commissioner of Sales Tax, Orissa v. Patnaik & Co.*¹, answered the question in the affirmative, i.e., against the appellant. In that case, the High Court had construed a similar contract and had come to the conclusion that

"the contract, therefore, as contemplated between the parties, is that the assessee was to deliver a specific goods, namely, a finished bus body built under the specifications prescribed by the Government for a fixed price. It cannot, therefore, escape from the position that the transaction was one for sale of some goods within the meaning of the Act."

It further observed that

"what exactly is the distinguishing feature of a sale from a works contract has been elaborately discussed in a case decided by this very Bench in S.J.C. No. 7 of 1959 (*M/s. Thakur Dass Mulchand v. The Commissioner of Sales Tax*) on 6th July, 1961 where it was held that a normal contract to make a chattel and deliver it when made includes a contract of sale, but it may not be always so. The test would be whether the thing to be delivered has any individual existence before delivery as the sole property of the party who is to deliver it."

The High Court distinguished *Gannon Dunkerley's case*² on the ground that as far as the terms of the contract between the parties were concerned, they clearly contemplated a case of sale of goods liable to sales tax under the Act, and it was not a works contract, as contended by the party. As stated above, the appellant having obtained Special Leave, the appeal is now before us

Mr. Viswanatha Sastri, the learned Counsel for the appellant, has addressed an elaborate argument to us and contended that the present case is not distinguishable from the decision of this Court in *Gannon Dunkerley's case*². He has cited a number of authorities in support of his contention, but it will not be necessary to review all these authorities as we feel that the answer to the question referred must depend on the construction of the agreement regarding the building of bus bodies. As laid down by this Court in *Chandra Bhan Gossain v. The State of Orissa*³,

"was it the intention of the parties in making the contract that a chattel should be produced and transferred as a chattel for a consideration ?"

The agreement was entered into on 20th April, 1957, between the appellant, called in the agreement "the Body Builders" and the State of Orissa. The State had accepted the quotations and decided to place orders for construction of 4 (four) numbers of Bus Bodies on the Chassis namely 4 (four) numbers of 190" Wheel Base F.F.C. Dodge/Fargo Chassis supplied by the Governor. The relevant clauses are as below :

"1 (a) That the Body Builders shall be responsible for the safe custody of the chassis as described in Schedule 'A' from the date of the receipt of the chassis from the Governor (Supplier) till their delivery to the Governor and shall insure their premises against fire, theft, damage and riot at their cost, so that these chassis are covered by insurance against such risks

(b) That while the works are in course of construction and until the Bus with Bodies built are taken over by the Governor, the Body Builder shall be responsible for the chassis and materials supplied to them and shall indemnify the Governor for any loss or damage to the said material

1. S.J.C. No. 77 of 1959—Judgment delivered in the Orissa High Court on 26th July, 1961.

2. (1958) S.C.J. 696 : (1958) 2 An.W.R. (S.C.)

66. (1958) 2 M.L.J. (S.C.) 66. (1959) S.C.R. 379: A.I.R. 1958 S.C. 560.

3. 14 S.T.C. 766.

(c) The completed Bus Bodies covered by this contract shall be delivered to the Governor on or before the 28th May, 1957 for two and 20th June, 1957 for the remaining two buses.

2. That the passenger Bus Bodies shall be constructed on the chassis in the most substantial and workmanlike manner, both as regards materials and otherwise in every respect in strict accordance with the specifications mentioned in Schedule 'B'.

3. That if any additional work is considered necessary by the Transport Controller, Orissa (hereinafter called the 'Controller') for which no rate is specified in the contract, the Body Builder will immediately inform the Controller, in writing the rate which they intend to charge for such additional work. If the Controller does not agree to the rates the Body Builder will not be under any obligation to carry out such additional work:

Provided that the Body Builder will not be entitled to any payment for any additional work unless they have received an order in writing from the Controller to that effect.

4. That the Body Builder will give a guarantee regarding the durability of the Body for a period of two years from the date of delivery to the Governor and if any imperfection or defective material became apparent within the guaranteed period the Body Builder shall rectify the defects at their own expenses.

5. That the time allowed for carrying out the work as entered in the contract shall be strictly observed by the Body Builder and shall be reckoned from the date of supply of chassis to them. The work shall throughout the stipulated period of the contract be carried on with all due diligence time being deemed to be of the essence of the contract and the Body Builder shall be liable to pay to the Governor as liquidated damages an amount equal to 50% on the amount of the estimated cost of the whole work as shown in the contract for every day that the work remains unfinished after the date fixed and the Governor may deduct such sum or sums from any money due to the Body Builders under these presents or may recover it otherwise:

Provided that the work will not be considered as finished until the defects detected on inspection as provided by clause 6, are rectified, to the satisfaction of the Controller.

6. That all works under or in course of execution or executed in pursuance of this contract shall at all times be open to inspection by the Controller or officers authorised by him in this behalf and they shall have the right to stop by a written order any work which in the opinion of the Controller, is deemed to have been executed with unsound, imperfect, unskilful or bad workmanship or with materials of inferior quality. The Body Builder on receipt of such written order, shall dismantle or replace such defective work or material at their own cost. In the event of failure to comply with the order within 7 days from the date of receipt of the order, the Controller shall be free to get the balance of the work done by any other agency and recover the difference in cost from the Body Builder:

Provided that for this purpose the Controller shall be at liberty to enter upon the premises of the Body Builder and take delivery of the unfinished bodies.

7. That the Body Builder shall be paid 50% of the cost of body building at the time of delivery and the rest one month thereafter.

8. That the Body Builder will deliver the vehicles complete with bodies at the destination or the destinations to be named by the Controller at their own cost and risk and shall be entitled to recover from the Governor the actual cost of transport by road or rail, transit insurance charges if any and other necessary incidental charges."

Schedule 'B' gives the various specifications for construction of composite bus bodies. Clause 9 of the Schedule provides the specifications of seat cushions for the upper class and lower class seats. Clause 11 provides for the fixing of two roof lamps and its necessary switches. Clause 14 provides for the fixing of luggage carrier on the top of the roof and an iron ladder up to luggage carrier at the rear. Various miscellaneous fittings are required to be fitted by clause 16, e. g., hand operated driver's traffic signal, nickel plated conductor's bell, wind screen wipers for the wind screen, tool box, box for First Aid equipment, etc.

Then, looking at the contract as a whole, what was the real intention of the parties? It will be noticed that the bus bodies are throughout the contract spoken of as a unit or as a composite thing to be put on the chassis, and this composite body consists not only of things actually fixed on the chassis but movable things like seat cushions, and other things though fixed but which can be very easily detached, e. g., roof lamps, wind screen wipers, luggage carrier, tool box, box for First Aid equipment, etc.

The next point to be noticed is that under the contract the property in the bus body does not pass to the Government till the chassis with the bus body is delivered at the destination or destinations to be named by the Controller except in the case contemplated in clause 6 of the agreement. That clause provides that if some work

is not satisfactorily done and the Body Builder on receipt of a written order does not dismantle or replace such defective work or material at his own cost within seven days, the Controller would be entitled to get the balance of the work done by another agency and recover the difference in cost from the Body Builder. The Controller is entitled for this purpose to take delivery of the unfinished body. But even in this case the property in the unfinished body would not pass to the Government till the unfinished body is seized.

Suppose a fire were to take place on the premises of the appellant and before delivery the bus bodies were destroyed or spoilt. On whom would the loss fall? There can only be one answer to this question and that is that the loss would fall on the appellant. Clause 1 of the agreement provides for insurance of the chassis but there is no provision regarding insurance of bus bodies. Therefore, it follows that till delivery is made, the bus bodies remain the property of the appellant. It could, if it chose to do so, replace parts or whole of the body at any time before delivery. It seems to us that this is an important indication of the intention of the parties. If the property passes at delivery, what does the property pass in? Is it movable property or immovable property? It will not be denied that the property passes in movable property. Then was this the very goods contracted for? Here again the answer is plainly in the affirmative.

Mr. Sastri draws our attention to the following passage in Benjamin on Sales (8th Edition), page 167 :

“Where a contract is made to furnish a machine or movable thing of any kind and before the property in it passes, to fix it to land or to another chattel, it is not a contract for the sale of goods. In such contracts the intention is plainly not to make a sale of movables as such, but to improve the land or other chattel, as the case may be. The consideration to be paid to the workman is not for a transfer of chattel, but for work and labour done and materials furnished.”

He says that here the bus body is being fitted to a chassis, *i.e.*, another chattel, and if this passage lays down the law correctly—and according to him it does—the present contract is not a contract for the sale of goods.

The only case cited in the foot-note relating to fixing of a chattel to another chattel is *Anglo-Egyptian Navigation Co. v. Rennie*¹. That case would be relevant if the question in this case was whether property in the materials used in the construction of the body passed to the Government plank by plank, or nail by nail. The answer would be in the negative, according to the above decision. But we are not concerned with this question here. The facts in that case may be conveniently taken from the head-note. The defendants contracted with the plaintiff to make and supply new boilers and certain new machinery for a steamship of the plaintiffs and to alter the engines of such steamship with compound surface condensing engines according to a specification. The specification contained elaborate provisions as to the fitting and fixing of new boilers and machinery on board the ship and the adaptation of the old machinery to the new. The boilers and other new machinery contracted for were completed, and ready to be fixed on board, and one instalment of £2,000 had been paid under the contract, when the ship was lost by perils of the sea. A second instalment of £2,000 was subsequently paid. The plaintiffs claimed delivery of the boilers and other machinery completed under the contract, and this being refused, brought an action for the detention of the same, or to recover back the £4,000 paid by them to the defendants. It was held that the contract was an entire and indivisible contract for work to be done upon the plaintiffs' ship for a certain price, from further performance of which both parties were released by the loss of the ship; that the property in the articles manufactured was not intended to pass until they were fixed on board the ship; and that consequently the plaintiffs were not entitled to the boilers and machinery, nor could they recover the £4,000 already paid as upon a failure of consideration. Here the question was whether according to the contract, the property in each portion certified by the Inspector as properly done passed to the plaintiffs as and when his certificate was given. This question was answered in the negative. This case is no authority for the proposition that whenever a contract provides for the fixing of a chattel to another chattel, there is no

1. (1875) L.R. 10 C.P. 271.

sale of goods. A few simple illustrations, will show that this cannot be the law. A wants new motor tyres. He goes to a dealer and asks that these may be supplied fitted on the car. Is there a sale of motor tyres or not? It is not an easy operation to fix new tyres; it needs an expert hand. But it will not be denied that it was in essence a contract for sale of goods. Take another illustration. A wants a luggage carrier to be fixed to his car. The carrier which B has needs to be altered a little. The contract is that he will alter it and fix it to the car. Has there been a sale of the luggage carrier or not? The answer obviously is 'yes'.

Mr. Sastri further relies on a passage in *Gannon Dunkerley's case*¹, at pages 413-414 :—

"It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the true interpretation of the expression 'sale of goods' there must be an agreement between the parties for the sale of the very goods in which eventually property passes. In a building contract, the agreement between the parties is that the contractor should construct a building according to the specifications contained in the agreement, and in consideration therefor receive payment as provided therein, and as will presently be shown there is in such an agreement neither a contract to sell the materials used in the construction, nor does property pass therein as movables. It is therefore impossible to maintain that there is implicit in a building contract a sale of materials as understood in law."

We are, however, unable to appreciate how this passage assists the appellant. In this case both the agreement and sale relate to one kind of property, namely, the bus body. The case of a contract to construct a building is quite different and, as held by this Court, the property there does not pass in the materials as movables; but under this contract the bus body never loses its character as movable property, and the property in the bus body passes to the Government as movable property. The following extract from the judgment in *Dunkerley's case*¹ brings out the fact that the title in a case of building contract passes to the owner as an accretion thereto :

"That exception does not apply to buildings which are constructed in execution of a works contract, and the law with reference to them is that the title to the same passes to the owner of the land as an accretion thereto. Accordingly, there can be no question of title to the materials passing as movables in favour of the other party to the contract."

As we have already said, it is clear on the terms of the contract in this case that the property in the bus body does not pass on its being placed or constructed on the chassis but when the whole vehicle including the bus body is delivered.

Mr. Sastri then relied on the decision of this Court in *Carl Still v. The State of Bihar*². That case does not apply to the facts of this case because this Court came to the conclusion on a construction of the agreement in that case that the contract there was entire and indivisible for the construction of specified works including buildings for a lump sum and not a contract of sale of materials as such.

Mr. Sastri then says that clause 3 is inconsistent with an agreement for sale of goods. This clause provides for additional work to be done for which no rate is specified in the contract. The clause, according to us, merely provides for extra payment if the Controller decided to order some additional things to be placed in the body. This is a neutral clause equally applicable to a contract for sale of goods or a contract for work and labour.

Mr. Sastri then points to clauses 5 and 6 and submits that these are totally inconsistent with an agreement for the sale of goods. But we are unable to assent to this. Clause 5 provides for a time schedule and ensures that the delivery of the bus body shall take place within the stipulated time. Clause 6 is designed to avoid disputes in the future as to the quality of the material used and ensures that proper material is used. A contract for the sale of goods to be manufactured does not cease to be a contract for sale of goods merely because the process of manufacture is supervised by the purchaser. For example, if in a contract for the manufacture and sale

¹. (1958) S.C.J. 696. (1958) 2 A.N.W.R. (S.C.) 66: (1958) 2 M.L.J. (S.C.) 66: (1959) S.C.R. 379 (413-414); A.I.R. 1958 S.C. 560. ². (1962) 2 S.C.J. 82: (1962) 2 S.C.R. 81: A.I.R. 1961 S.C. 1615.

of military aircraft, a great deal of supervision is insisted upon by the purchaser, the contract would not become a contract for works and labour.

We may now notice some of the Indian cases in which a similar point arose.

In *Commissioner of Sales Tax, U.P. v. Haji Abdul Majid*¹, the Allahabad High Court arrived at the conclusion that in the circumstances of the case the transaction was a contract for the sale of bus bodies and not a contract for work and labour. Desai, C.J., rightly pointed out at page 443 that

"since it makes no difference whether an article is a ready-made article or is prepared according to the customer's specification, it should also make no difference whether the assessee prepares it separately from the thing and then fixes it on it or does the preparation and the fixation simultaneously in one operation."

In *Jiwan Singh v. State of Punjab*², the High Court of Punjab also held that a contract by a firm for fitting and building motor bodies with its own materials on the chassis supplied by customers is a contract for the sale of goods.

In *Kailash Engineering Co. v. The State of Gujarat*³, it was held that the contract in that case for building, erecting and furnishing of third class timber coach bodies on broad gauge under-frames to be supplied by the Railway administration was not a contract for the sale of goods. The same conclusion was reached in *Kays Construction Company v. The Judge (Appeals) Sales Tax, Allahabad*⁴. We do not propose to say whether these cases were correctly decided on the facts for, as we have said in the beginning, in each case it is a question of intention of the parties.

To conclude, we have come to the finding that the contract as a whole is a contract for the sale of goods. Agreeing with the High Court, we hold that the answer to the question referred is against the appellant. The appeal accordingly fails and is dismissed with costs.

In the other two appeals relating to assessments for the quarters ending 30th September, 1957 and 31st December, 1957, the agreements are similar and these also fail and are dismissed with costs. There will be one set of hearing fee in all the three appeals.

ORDER OF THE COURT : In accordance with the opinion of the majority, these appeals are dismissed with costs. One hearing fee.

K.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—K. SUBBA RAO, *Acting Chief Justice*, K. N. WANCHOO, M. HADAYA-TULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Joseph Pothan

.. *Petitioner**

v.

The State of Kerala

.. *Respondent.*

Constitution of India, 1950, Entry No. 67 of List I, Entry No. 12 of List II and Entry No. 40 of List III of Schedule VII—Travancore Ancient Monuments Preservation Regulation (I of 1112 M.E.) (1936)—Purchase of property from the Maharaja—Palace wall—Declaration by notification under the State Law that wall to be a protected monument—Validity of notification—State Law, if impliedly repealed by the Part B States (Laws) Act of 1951—Ancient monuments—Power of Parliament to enact law only if it was declared to be of national importance—Extension of Central Act—Only to matters within the competence of Parliament.

Words and Phrases—"Monument"—"Archaeology".

Ancient and Historical Monuments and Archaeological Sites Remains (Declaration of National Importance) Act (LXXI of 1951) and Central Act XXIV of 1952.

The impugned notification declaring a palace wall in Trivandrum City a protected monument was validly made under the State Law.

Having regard to the Entries No. 67 of List I, No. 12 of List II and No. 40 of List III, Parliament could only make law with respect to ancient and historical monuments and archaeological sites and

1. 14 S.T.C. 435.

3. 15 S.T.C. 574.

2. 14 S.T.C. 957.

4. 13 S.T.C. 302.

* W.P. No. 95 of 1954.

3rd February, 1965.

remains declared by Parliament to be of national importance. Where Parliament has not declared them to be of any national importance, the State Legislature has exclusive power to make law in respect of ancient and historical monuments and records and Parliament and the State Legislature can make laws subject to the other constitutional provisions in respect of archaeological sites and remain.

“Monument” means, among others, “a structure surviving from a former period”; whereas “archaeology” is the scientific study of the life and culture of ancient people.

Notwithstanding the extension of the Central Act VII of 1904 to the Travancore area and the passing of Central Acts LXXI of 1951 and XXIV of 1958, the State Act continued to hold the field in respect of the monument in question.

The impugned notification made under Regulation I of 1112 M.E. (1936) a State law validly enacted at that time, and was also validly in force after the formation of the Travancore-Cochin State. Under the Part B States (Laws) Act III of 1951 the Ancient Monuments Preservation Act of 1904 was extended to the new State. Under section 3 of the Part B States (Laws) Act of 1951 the application of the Central Act was limited to matters with respect to which Parliament had power to make laws. Since Parliament can make a law in respect of ancient and historical monuments and records declared by or under law made by it to be of national importance, and since the Central Act of 1904 did not embody any declaration to that effect, the Central Act could not enter the field occupied by the State Legislature under List II. It follows that the State Act held the field notwithstanding the extension of the Central Act and the impugned notification is validly made. The monument in question was not included in the Schedule to the Central Act LXXI of 1951 and Central Act XXIV of 1958.

The Fort Wall purchased by the petitioner from the Maharaja, was a historical monument and was treated as such, being the wall built around the Famous Sree Padmanabhaswami Temple. It is not an archaeological site for exploration and study, but an existing structure surviving from a former period.

Petition under Article 32 of the Constitution for enforcement of the Fundamental Rights.

T. N. Subramonia Iyer, Senior Advocate (*Arun B Saharaya* and *Sardar Bahadur*, Advocates, with him); for Petitioner.

V. P. Gopala Nambiar, Advocate-General for State of Kerala (*V. A. Seyid Muhammad*, Advocate, with him); for Respondent.

The Judgment of the Court was delivered by

Subba Rao, A. C. J.—This is a petition under Article 32 of the Constitution for issuing an appropriate writ to quash the order and notification dated 3rd October, 1963, issued by the respondent and to restrain it from interfering with the petitioner's right in the property comprised in survey Nos. 646 to 650 in Trivandrum City.

Kizhakke Kottaram (*i.e.*, Eastern Palace), 2 acres and 57 cents in extent, comprised in survey Nos. 646 to 650 and consisting of land, trees, buildings, out-houses, the surrounding wall on all sides, gates and all appurtenants, in the city of Trivandrum originally belonged to His Highness the Maharaja of Travancore. Under a sale deed dated 7th January, 1959, the Maharaja sold the same to the petitioner. The petitioner's case is that the eastern wall now in dispute is a portion of the Palace wall and is situate in survey Nos. 646 to 650 and that since the purchase he has been in possession of the same. On 3rd October, 1963, the Government of Kerala passed an order, G.O. (Ms.) No 661/63/Edn., purporting to be under the provisions of the Travancore Ancient Monuments Preservation Regulation I of 1112 M.E. (1936-37 A.D.). Under that order the Government considered the Fort walls around the Sree Padmanabhaswamy Temple as of archaeological importance and that they should be preserved as a protected monument. Under that order the said walls are described as being situated, among others, in the aforesaid survey numbers also. Pursuant to that order the State Government issued a notification dated 3rd October, 1963, declaring the said walls to be a protected monument for the purpose of the said Regulation. The petitioner, alleging that the part of the said walls situate in the said survey numbers belonged to him and

he was in possession thereof and that the said notification infringed his fundamental right under Article 19 (1) (f) of the Constitution, filed the present writ petition.

The State filed a counter-affidavit in which it admitted that the Kizhakké Kottaram was purchased by the petitioner from the Maharaja of Travancore, but contended that the wall which bounded the Kizhakke Kottaram on the east was part of the fort wall which had always remained and continued to remain to be the property of the Travancore-Cochin, and later on Kerala, Government. It was further alleged that though the said wall was part of the historic fort wall, the petitioner deliberately "intermeddled" with it. In short, the respondent claimed that the said wall was part of the historic fort wall and, therefore, the said notification was validly issued in order to preserve the same and that the petitioner had illegally encroached upon it.

It is not necessary to state the different contentions of the parties at this stage, as we shall deal with them separately.

The learned Advocate-General of Kerala raised a preliminary objection to the maintainability of the application on the ground that the petition is barred by the principle of *res judicata* in that a petition for the same relief was filed before the High Court of Kerala and was dismissed. The petitioner filed O.P. No. 1502 of 1960 in the High Court of Kerala at Ernakulam for a relief similar to that now sought in this petition. The said petition came up before Vaidialingam, J., who dismissed that petition on the ground that it sought for the declaration of title to the property in question, that the said relief was foreign to the scope of the proceedings under Article 226 of the Constitution and that claims based on title or possession could be more appropriately investigated in a civil suit. When an appeal was filed against that order, a Division Bench of the High Court, consisting of Raman Nair and Raghavan, JJ., dismissed the same, accepting the view of Vaidialingam, J., that the proper forum for the said relief was a civil Court. It is, therefore, clear that the Kerala High Court did not go into the merits of the petitioner's contentions, but dismissed the petition for the reason that the petitioner had an effective remedy by way of a suit. Every citizen whose fundamental right is infringed by the State has a fundamental right to approach this Court for enforcing his right. If by a final decision of a competent Court his title to property has been negatived, he ceases to have the fundamental right in respect of that property and, therefore, he can no longer enforce it. In that context the doctrine of *res judicata* may be invoked. But where there is no such decision at all, there is no scope to call in its aid. We, therefore, reject this contention.

The next question is whether the petitioner has any fundamental right in respect of the wall in dispute within the meaning of Article 19 (1) (f) of the Constitution. The sale deed under which the petitioner has purchased the Eastern Palace from the Maharaja is filed along with the petition as Annexure A-2. Under the said sale deed, dated 7th January, 1959, the Maharaja sold the Eastern Palace situate in survey Nos. 646 to 650, 2 acres and 56 cents, in extent, to the petitioner. The outer compound walls of the said Palace building were also expressly conveyed under the sale deed. In the schedule of properties annexed to the sale deed the eastern boundary is given as a road. *Prima facie*, therefore, the sale deed establishes that the Maharaja conveyed the eastern wall of the building abutting the road to the petitioner. In the counter-affidavit the State, while admitting the title of the Maharaja to the Eastern Palace and the execution of the sale deed by him conveying the said Palace to the petitioner, asserted that the disputed wall is part of the historic Fort wall. According to the State, Sree Padmanabhaswamy Temple is surrounded by the historic Fort wall and the disputed wall is a part of it. In support of this contention, the State has given extracts from the Travancore State Manual, the list of forts furnished to the Government by the Chief Engineer in 1886, the history of Travancore by Sri K. P. Sankunni Menon, the Memoir of the Survey of Travancore and Cochin States by Lieutenants Ward and Conner, and the Trivandrum District Gazetteer published in 1962. The said extracts describe the history of the Fort

wall. It is not possible, without further evidence, on the basis of the affidavits filed by the petitioner and the State to come to a definite conclusion whether the disputed part of the wall is a part of the historic Fort wall. We are, therefore, withholding our final decision on this point, as we are satisfied that the petitioner has purchased the disputed wall from the Maharaja and is in physical possession thereof. Indeed, the fact that he is in possession has been admitted by the State in its counter-affidavit. It is stated therein that the petitioner has "intermeddled" with the wall. The petitioner has possessory title in the wall and is, therefore, entitled to be protected against interference with that right without the sanction of law.

The next question is whether the Travancore Ancient Monuments Preservation Regulation (I of 1112 M.E.) ceased to be law in the State of Kerala and, therefore, the said notification issued thereunder had no legal force. It was contended that Regulation I of 1112 M.E. was impliedly repealed by the extension of the Central Act *i.e.*, the Ancient Monuments Preservation Act, 1904, in the year 1951 to Kerala, as the said Act covered the same field occupied by the State Act, or at any rate the said Regulation was impliedly repealed by the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (LXXI of 1951) and the Ancient and Historical Monuments and Archaeological Sites and Remains Act, 1958 (XXIV of 1958). To appreciate this contention it would be convenient at the outset to notice the relevant legislative fields allotted to the Central and State Legislatures by the entries in the three Lists of the Seventh Schedule to the Constitution. The following are the relevant entries in the said Schedule :

Entry 67 of List I (Union List) :

Ancient and historical monuments and records, and archaeological sites and remains, declared by or under law made by Parliament to be of national importance.

Entry 12 of List II (State List) :

Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance.

Entry 40 of List III (Concurrent List) :

Archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance

It will be noticed that by reason of the said entries Parliament could only make law with respect to ancient and historical monuments and archaeological sites and remains declared by Parliament to be of national importance. Where the Parliament has not declared them to be of any national importance, the State Legislature has exclusive power to make law in respect of ancient and historical monuments and records and both Parliament and the State Legislature can make laws subject to the other constitutional provisions in respect of archaeological sites and remains. Regulation I of 1112 M.E. is of the year 1936 A.D. It was a State law and it is not disputed that it was validly made at the time it was passed. After the Travancore-Cochin State was formed under the Travancore-Cochin Administration and Application of Laws Act, 1125 M.E. (VI of 1125 M.E.) (1949 A.D.) the existing laws of Travancore were extended to that part of the area of the new State which before the appointed day formed the territory of the State of Travancore. The result was that the said Regulation continued to be in force in the Travancore area of the new State. The Part B States (Laws) Act, 1951 (III of 1951) was made by Parliament; and thereunder the Ancient Monuments Preservation Act, 1904, was extended to the new State of Travancore-Cochin. A comparative study of the two Acts, *i.e.*, the Ancient Monuments Preservation Act, 1904, and the Travancore Ancient Monuments Preservation Regulation I of 1112 M.E., shows that they practically covered the same field. If there was nothing more, it may be contended that the State Act was impliedly repealed by the Central Act. But

and whether the Acts apply to both ancient monuments strictly so called and to archaeological site or remains. If the definition was wide enough to cover both—on which we do not express any opinion—the State Act may be liable to attack on the ground that it, in so far as it deals with archaeological site or remains, was displaced by the Central Act. But the State Government only purported to notify the Fort wall as an ancient monument and, therefore, if the State Act, in so far as it dealt with monuments is good, as we have held it to be, the impugned notification was validly issued thereunder.

The Constitution itself, as we have noticed earlier, maintains a clear distinction between ancient monuments and archaeological site or remains; the former is put in the State List and the latter, in the Concurrent List.

The dictionary meaning of the two expressions also brings out the distinction between the two concepts. "Monument" is derived from *monere*, which means to remind, to warn. "Monument" means, among others, "a structure surviving from a former period", whereas "archaeology" is the scientific study of the life and culture of ancient peoples. Archaeological site or remains, therefore, is a site or remains which could be explored in order to study the life and culture of the ancient peoples. The two expressions, therefore, bear different meanings. Though the demarcating line may be thin in a rare case, the distinction is clear.

The entire record placed before us discloses that the State proceeded on the basis that the Fort wall was a monument; the notification dated 3rd October, 1963, issued by the State Government described the wall as a protected monument. The petitioner questioned the notification on the ground that it was not a monument but a part of the boundary wall of his property. He did not make any allegation in the petition filed in the High Court that it was an archaeological site or remains and, therefore, the Central Act displaced the State Act. Nor did he argue before the High Court to that effect. In the petition filed in this Court he questioned the constitutional validity of the State Act only on the ground that the Ancient Monument Preservation Act, 1904, impliedly repealed the State Act relating to monuments. He did not allege that the Fort wall was an archaeological site or remains and, therefore, the State Act as well as the notification were invalid. The present argument is only an after-thought.

The extracts given in the counter-affidavit filed by the State from the relevant Manuals and other books and documents show that the Fort wall was a historical monument and was treated as such, being the wall built around the famous Sree Padmanabhaswami Temple. It is not an archaeological site for exploration and study, but an existing structure surviving from a former period. For the aforesaid reasons we hold that the Fort wall is a monument and the State Government was within its rights to issue the impugned notification under section 3 of the State Regulation I of 1112 M.E. We are not deciding in this case whether the wall in dispute is part of the Fort wall. Such and other objections may be raised under the provisions of the Act in the manner prescribed thereunder.

In this view, it is not necessary to express our opinion on the question whether Article 363 of the Constitution is a bar to the maintainability of the petition.

In the result, the petition fails and is dismissed with costs.

V.S.

Petition dismissed.

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EQUALITY OF OPPORTUNITY IN PUBLIC EMPLOYMENT

By

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1. *Introduction.*—Article 14 of the Indian Constitution states that the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India. When this article was adopted in India, the American interpretation for the equal protection clause, namely, that it does not prevent reasonable classification and a classification based on intelligible differentia which has a rational nexus to the object sought to be achieved by the legislation is a valid classification, was well-known. Under this principle a classification based on religion or caste or sex could be a reasonable classification. But for obvious reasons Indians wanted to forget that part of their country's past which was steeped in casteism, communalism and similar factors or practices which tended to divide and not unite her inhabitants. Article 15, therefore, forbade the State to make classifications on the basis 'only of religion', race, caste, sex, place of birth or any of them and Article 16 forbade any such classification based on the above-mentioned grounds and on two other additional grounds, namely, 'descent' and 'residence' in matters relating to employment or appointment to the services under the State.

Article 16 of the Indian Constitution reads as follows :

" 16. *Equality of opportunity in matters of public employment.*—

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within, that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."

Dr. Ambedkar¹, Chairman of the Drafting Committee of the Indian Constitution had explained the proposition which they wanted to include by inserting Article 16 of the Draft Constitution which corresponds to Article 16 of the present Constitution. According to him Article 16 sets two conflicting principles at motion on the same path of State action and expects them to move smoothly and harmoni-

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1. VII. Constituent Assembly Debates (hereinafter abbreviated as C.A.D.) 702.

ously. They are, the first and primary principle of equality of opportunity in public employment, and the second and the subsidiary principle that there may be reservation in favour of certain sections of the citizens who had not so far had 'a proper look-in' into the administration. Among the two principles, the first principle has always a prominent position. This paramountcy of the first principle over the second can be fairly seen from the following circumstances. Firstly, the subtitle of Article 16 itself states that its content is "Equality of opportunity in public employment". Secondly, if the main intention of Article 16 was primarily to provide reservation in favour of backward class, relegating the principle of equality into a subsidiary object, it would have been sufficient to add the provisions of Article 16 (4) as an exception to Article 14 which contains the general principle of equality. Thirdly, the provisions prohibiting discrimination are laid first both in Articles 15 and 16, and the reservation provisions contained in Articles 15 (4) and 16 (4) are laid down only after them. Fourthly, while Article 15 prohibits discrimination on five specific grounds, Article 16 adds to them two more grounds. This addition to the enumerated ground shows that by the operation of Articles 15 and 16 the framers of the Indian Constitution wanted to prohibit discrimination on those enumerated grounds at any cost and for all purposes. And lastly, one of the cardinal policies of the Constitution itself is to ensure equality of opportunity² and Article 16 (4) is to help the State implement that policy as quickly as possible.

While Article 16 seeks to prohibit discrimination on the seven grounds enumerated therein, in the particular field of public employment, Article 15 prohibits discrimination on five grounds specified therein and such prohibitions operate on all State action. Article 14 governs all discriminations which are left uncovered by Articles 15, 16 and 29 (2)³. So each of those articles has been assigned distinct functions which cannot be satisfactorily and effectively discharged by the other articles. Sir Ivor Jennings⁴ has stated about the inter-relation of those articles thus.

"Thus the Courts are faced with the problem whether the type of discrimination not covered by Article 16 is discrimination within the meaning of Article 15 or whether the classes of persons not covered by Article 15 are covered by Article 14. If both questions are answered in the affirmative, Articles 15 and 16 are quite unnecessary; but since nobody is allowed to assume that two sections of a Constitution are mere verbiage, they must mean something and what may possibly be read into the Constitution is that Article 14 does not mean what it says. The position would have been quite plain if 'without prejudice to the generality of Article 14' had been used."

Nor is Article 16 (1) which provides for 'equality of opportunity' in the public service, very happily phrased, for it is difficult to know what it means. To reach the highest branch of the public service in India, or elsewhere, it is necessary to secure primary education, secondary education and higher education. Can a poor peasant in the Madras State secure an injunction against the Federal Public Service Commission because there is no school in his village and therefore he has been denied equality of opportunity? These vague political aspirations do no harm when they have become Directive Principles of State Policy: but this is a rule of law.

If by the first part of his criticism he really meant that the defect of overlapping of these articles would have been remedied by the adding of the draftman's usual escape clause "without prejudice to the generality of Article 14" to Articles 15 and 16, then, it can fairly be presumed that those two articles are subject to such a quali-

2. In the Preamble of the Constitution it is stated that the people of India have resolved "to secure to all its citizens.... Equality of status and of opportunity."

3. "In cases not covered by Articles 15 and 16, the general principle of equality laid down in Article 14 is attracted" Alladi Krishnaswamy Aiyar, "The Constitution and Fundamental Rights", p. 29, 1952.

4. "Some Characteristics of the Indian Constitution", pp 43, 44.

lying clause⁵. If such a presumption is not drawn, those three articles will conflict with each other. But if he meant that either Articles 15 and 16 or Article 14 is sufficient and either of the two is redundant⁶, then, the purpose of the so-called redundant article would not have been satisfied by the other article. For instance, if the Defence Ministry issues a notification directing that all recruitment of commissioned officers to the Indian Army for a specified period of emergency be entirely made from among applicants who are descendants of the Army Officers holding offices at present or held offices in the past, this measure may be said to have been a gesture of encouragement to the present officers. Since this classification of applicants has an intelligible differentia and has a rational relation to the object sought to be achieved the Court may or may not strike down the notification under Article 14. But the framers of the Indian Constitution wanted to prohibit such discriminations positively due to the special situation and problems which were confronting the new born independent India⁷. So by inserting Articles 15 and 16, they forbade certain discrimination on some specific grounds such as 'descent' in the above illustration. One might ask whether such a law as given in the above illustration would have been held valid in the United States of America under the equal protection clause. It has fairly to be conceded that it would not have been. Then was it not enough to have left all discriminations to Article 14? No, for three reasons. First, the very history of segregation in the United States shows that, though it is generally accepted in America to-day that segregation is incongruous to the 14th Amendment, at the time of the adopting of the Constitution few even thought of the Negro's right. Similarly since generations have worked with the caste system that the idea that certain castes shall for all time be outside the pale of the Civil Service might not appear strange. The Constitution-makers wanted to uproot such an idea. Hence Articles 15 (1) and 16 (1) and (2). But they wanted to do more. Within human capacity they wanted to atone for the hardships that their forefathers imposed on certain sections of the community on the basis of caste and sex, social status and economic disability, etc. Hence Articles 15 (3) and (4) and 16 (4). Again, they wanted to provide speedy justice to the citizen affected by the discriminatory measure without casting upon him the intricate and often impossible burden of proving the unreasonableness or arbitrariness of the discrimination. The usual rule is that whoever attacks a law must discharge the onerous burden of establishing the invalidity of that law. According to the provisions of Articles 15 (1) and 16 (2) it is quite clear that whenever a State action is alleged to be discriminatory by reason of its being made on any of the grounds commented therein, the burden to show otherwise falls on the State⁸.

5. The Supreme Court has read those articles as if there exists such a qualifying clause. For example, in *Banarsidas v. State of U.P.*, (1956) S.C.J. 529. (1956) S.C.R. 357; A.I.R. 1956 S.C. 520, the Court said that Article 16 is an instance of the application of the general rule of equality laid down in Article 14 with special reference to the opportunity for appointment and employment under the Government.

6. "We have seen that the equality principle is not only contained in a general form in Article 14, but repeated for specific purposes in Articles 15, 16 and 29 (2)." Sir Ivor Jennings considering the inter-relationship between Article 14 and the other three articles, comes to the tentative conclusion that the latter may not be necessary at all. But as they cannot be mere verbiage, he thinks that 'Article 14 does not mean what it says'. However, judicial practice has shown that there is room for specific provision apart from Article 14. Moreover, the principle of protective discrimination had to be introduced in the specific provisions, as its inclusion in a general equality clause would have been impracticable. (How it would have been impossible is not clear). Article 14 obviously means what it says though it could not be general to the extent of not admitting reasonable classification and even discrimination in the interests of the community or its particular sections." Alexandrowicz, "Constitutional Development in India," p. 80.

7. "The fundamental rights in the Indian Constitution may be said to be a combination of the usual Bill of Rights interspersed with provisions which could be understood only in the context of contemporary Indian Society", Setalvad, M.C., "The Common Law in India," p. 205, 1960.

8. "Whereas under Article 14 a legal enactment may be presumed to be based on a reasonable classification unless the contrary is proved, under Articles 15, 16 and 29 (2) such legal enactment may be considered *prima facie* invalid if it is discriminatory on the grounds of religion, race, caste or other grounds enumerated in these articles" Alexandrowicz, "Constitutional Development in India," p. 80.

The second part of Jenning's criticism is directed against the applicability of Article 16 itself. To say that equality of opportunity cannot be ensured without ensuring equal facilities for education, is to stretch an argument to its logical extreme. Equality of opportunity in public employment does not mean equality of opportunity in providing education. There are many provisions in the Constitution such as Articles 15 (4), 29 (2), 41 and 45 which are designed to facilitate the providing of education in accordance with the principle of equality. Article 16 is purely intended for the benefit of, and for prohibiting discrimination on the seven specific grounds enumerated therein against, citizens who are fit and qualified to be appointed or employed in the services under the State. Equality is predicated only among those persons in the specific matter of appointment. A criticism of this nature makes one say that the right 'to move freely throughout the territory of India' under Article 19 imposes an obligation on the State to arrange for travel whenever a citizen is under a necessity to move throughout the territory of India or without which he cannot effectively use that right.

Professor Sheridan⁹ has made an attempt to elucidate the nature and content of Articles 14, 15 and 16 of the Indian Constitution while he wrote about equality of opportunity as embodied in Article 16 :

"Before an examination of disputed and decided cases, the following points should be made about the text and its context. First, all discrimination offending Article 16 (2) is unconstitutional unless falling within clauses (3) to (5) of the same article. Secondly, discrimination in matters of public employment, wholly or partly on a ground not listed in Article 16 (2), may still be unconstitutional under Article 16 (1) unless falling within clauses (3) to (5) of the same article. Thirdly, discrimination not infringing Article 16, because not relating to opportunity in matters of public employment or appointment to an office under the State, may be unconstitutional by virtue of infringing Article 15 or some other article¹⁰, forbidding discrimination on some specific ground. Finally, if not offending Article 15 or Article 16 or some other article aimed against some specific type of discrimination, a discriminatory act may be unconstitutional by virtue of Article 14."

This excellent analysis of the functions of Articles 14, 15 and 16 appears acceptable except with regard to his illustration, picked out from Article 19 (1) (g). Is it not that a citizen who has been denied a right under Article 19 (1) (g) can go to the Court not on the ground of discrimination but on the ground that the particular guaranteed right is denied unlawfully and without sufficient reasons? Of course, if there is discrimination of any kind certainly he can take refuge under the shelter of Article 14 which will afford him adequate protection.

The Supreme Court of India has on many occasions considered the inter-relation of Articles 14, 15 and 16. But it can be said that it never explained fully the purpose of, and the logic behind, these provisions in their relationship with each other. In *Gasula Dasaratha Rama Rao v. State of Andhra Pradesh*¹¹, S. K. Das, J., said :

"Article 14 guarantees the general right of equality; Articles 15 and 16 are instances of the same right in favour of citizens in some special circumstances, Article 15 is more general than Article 16, the latter being confined to matters relating to employment or appointment under the State."

9. Sheridan, "Equal Opportunity of Public Employment" Vol., "The International and Comparative Law Quarterly", July, 1962, p. 784.

10. The following example is cited as a footnote in Sheridan's article : "For example,—by Article 19 (1), all citizens shall have the right.....(g) to carry on any occupation".

11. (1961) 2 S.C.R. 931 : (1961) 1 M.L.J. (S.C.) 63 : (1961) 1 An.W.R. (S.C.) 63 : (1961) 1 S.C.J. 310 : A.I.R. 1961 S.C. 564. In *Banarsidas v. State of U.P.*, (1956) S.C.J. 529 : (1956) S.C.R. 357 : A.I.R. 1956 S.C. 520, Sinha, J., also expressed a similar opinion. In *General Manager, Southern Railway v. Rangachari*, (1961) 2 M.L.J. (S.C.) 71 : (1961) 2 An.W.R. (S.C.) 71 : (1961) 2 S.C.J. 424 : (1962) 2 S.C.R. 586 : A.I.R. 1962 S.C. 36, Gajendragadkar, J., said that the three provisions form part of the same constitutional code of guarantees and supplement each others.

2. 'Office under the State' in Article 16 (1) and (2).—Article 16 has exclusive reference to State action and it aims at equality of opportunity only in matters relating to appointments to the services under the State, since nobody, authority or individual can disturb the equality or create inequality in appointment to the public service. Article 12 defines 'State' and it includes the Government and Parliament of India, the Government and Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. So Article 16 shall have no application to any appointment to any office or company of a private person or body.

Termination of the service of a person appointed temporarily under a contract does not amount to the violation of Article 16 provided the terms of the contract expressly or impliedly exclude the operation of that article¹². A contractor who undertakes to carry out a certain piece of work for the benefit of the State according to the terms of a contract entered into between such contractor and the State, shall not be deemed to be appointed under the services of the State and so shall be deprived of the benefit of Article 16¹³.

In *Dasaratha Rama Rao v. State of Andhra Pradesh*¹⁴, the Supreme Court held that the office of a Village Munsif was an office under the State and that an Act of the Madras State which recognised the custom of electing persons to fill the office of Village Munsif on the ground of descent only was *ultra vires* Article 16 (2). The Court found that under Article 13 'law' includes custom and usage and so if there is any custom which has been recognised by law with regard to any hereditary village office, that custom must yield to the fundamental rights and that the expression 'office under the State' must be given its natural meaning. The factors which were taken into consideration by the Court for declaring the office as an 'office under the State' were the exercise of public functions by the holder of the office, the emoluments he received from the States, and the powers of appointment and to take disciplinary action which were being vested in the Government. The same tests were applied by the various High Courts to decide similar questions¹⁵. But in *Dattatraya Motiram More v. State of Bombay*¹⁶, Chagla, C.J., of the Bombay High Court maintained the view that the expression 'under the State' indicates an employer-employee relationship between the persons holding the office and the State or at least an element of subordination to the State. From the discussion of the above cases the difficulty to draw *a priori* dividing lines between citizens holding office with a right to invoke Article 16, and citizens holding office without a right to have the benefits of Article 16 is quite apparent. Each case is to be decided on its own merits. But generally the question is determined on the basis of a variety of factors such as appointment, remuneration, nature of public function vested in the holder of the office, the extent of Government control over the office, and the State's recognition of the office as a public office. Any one or more of them may determine the question. If one has to state the principle very briefly it will be that in order to

12. *Satish Chandra Anand v. The Union of India*, (1953) S.C.J. 323 : (1953) S.C.R. 655 : A.I.R. 1953 S.C. 250.

13. *G. K. Achuthen v. State of Kerala*, (1959) S.C.J. 465 : (1959) 1 S.C.R. (Sup.) 787. (1959) 1 An.W.R. (S.C.) 164 : (1959) 1 M.L.J. (S.C.) 164 : A.I.R. 1959 S.C. 490 ; *Prabananda Das v. Executive Engineer, Relief and Rehabilitation, Engineering Division, Assam*, A.I.R. 1961 Assam 101.

14. (1961) 1 M.L.J. (S.C.) 63 : (1961) 1 An.W.R. (S.C.) 63 : (1961) 1 S.C.J. 310 : (1961) 2 S.C.R. 931 : A.I.R. 1961 S.C. 564.

15. In *Bhaskara Moharana v. Arjun Moharana*, A.I.R. 1962 Ori. 167, the Orissa High Court held that the office of a village artisan was an office under the State since the holder of the office performed public functions after receiving emoluments from the State and since the State impliedly recognised the office as a public office though the holder was not appointed formally. The Mysore High Court declared the office of a Village Patel as an office under the State and held succession on the basis of descent *ultra vires* Article 16 (2), in *Balakrishna Hegde v. Sankara Hegde*, A.I.R. 1962 Mys. 233. The Madhya Pradesh High Court in *Narayana Keshav Dandekar v. R.C. Ragh*, A.I.R. 1963. M.P. 17, held that a post under a Municipal Corporation was an office under the State.

16. A.I.R. 1953 Bom. 311, in this case the provisions of the Bombay Municipal Boroughs Act which reserved seats for women in elected Municipal Borough Councils were held valid under Article 16 (1) on the ground that there was no employer-employee relationship between the municipality and its councillors.

constitute a post under the 'State' law must provide for it as the post and such law must comply with the Constitution.

3. *Equality between members of the same class only.*—One of the natural corollaries of the principle of equality of opportunity is that equality can be predicated only between persons belonging to the same class and having identical characteristics. It would be open to the appointing authority to prescribe the necessary qualifications of persons to be appointed and to select the best persons in all respects up to its satisfaction from among the numerous qualified applicants. But an appointment to a public office would be contrary to Article 16. If the post was not regularly advertised nor were any applications invited from persons qualified to hold the post, for the purpose of selection¹⁷ in fixing up the qualifications for recruitment to Public Service, the appointing authority can lay down such conditions as would be conducive to the maintenance of proper discipline amongst Government servants, provided the conditions are reasonable, and not arbitrary¹⁸. The qualifications prescribed for holding a post must have a reasonable relation to the duties which the person has to perform while holding that post¹⁹. Thus in *Panduranga Rao v. Andhra Pradesh Public Service Commission*²⁰, the Rules made by the Governor of Andhra Pradesh which prescribed that a candidate for the post of District Munsiff should be a practising Advocate of the Andhra High Court, were struck down by the Supreme Court. The Court found that since 'all the High Courts' had the same status and 'all Advocates enrolled in all of them' were presumed to follow the same standards, the classification between one class of Advocates and the rest was irrational inasmuch as there was no nexus between the basis of the said classification and the object intended to be achieved by the relevant scheme of rules.

It may not amount to a violation of the provisions of Article 16 if the Government refuse to appoint a person even after he is being selected by a proper selection body if, to the satisfaction of the Government, the person has no good character²¹. In such cases the Government need not disclose the reasons for arriving at its decision, but the subjective satisfaction of the Government can be questioned on the ground that it was based on no material whatever, or that it was actuated by *mala fides*, or that irrelevant matters were taken into consideration by the authority concerned²². The Government can terminate the service of a person holding any office under the State without infringing the right of equality of opportunity if he is found engaged in political activities²³ or if he betrays an improper conduct²⁴. But it is not open to the Government to impose a permanent ban against the employment in public service of a person whose services have been terminated by reason of

17. *Narayana Keshav Dandekar v. R. G. Rath*, A I R. 1963 M P 17.

18. *Banarsidas and others v. State of Uttar Pradesh*, (1956) S C J 529 (1956) S C R 357 : A I R. 1956 S C 520. In this case about 93 per cent. of the 28,000 Patwaris in the whole State of U P resigned their posts in response to a call of the Patwaris Association with a view to compel the Government to accept certain demands raised by them. The Government, after accepting the resignations contrary to their expectations, took steps to recruit new hands by the creation of a new service of 'Lekhpals'. The Government prescribed that only those persons whose record of service was free from blemishes were to be recruited. The effect of that condition was to prevent the old Patwaris from entering into the new service and so they alleged that it amounted to a denial of equality of opportunity. The Supreme Court found the condition to be in conformity with Article 16 (1), and that it is essential for the proper maintenance of discipline inside the services.

19. In *Sukhnandan Takur v. State of Bihar*, A I R 1957 Pat 617, a scheme of retrenchment which provided that the staff should be retained in the order of seniority determined on the basis of their service records and for their being 'political sufferers', 'displaced persons', etc., even though they were junior in service. Declaring the scheme unconstitutional Ramaswamy, J, held that the circumstance that a candidate was a political sufferer or displaced person had no rational relation or bearing on the sufficiency or proper performance of his duties as a Supply Inspector.

20. (1963) 1 S C R 707 · A I R 1963 S C 268

21. *K. Sadandan v. State of Kerala*, A I R 1963 Ker 59, *Dasan v. State of Kerala*, 1964 K L T. 36.

22. *Ravindra Kumar Vakil v. State of U P*, A I R. 1961 All 361.

23. *Ramesh Chandra v. State Government of Uttar Pradesh*, A I R. 1959 All. 47.

24. *Union of India v. Pandurang Kasinath More*, A I R 1962 S C 630.

his antecedents²⁵. In *Kishan Chander Nayar v. Chairman, Central Tractor Organisation*²⁶, the Supreme Court held that such a ban, which was arbitrarily imposed, would amount to a denial of the right of equal opportunity in public employment guaranteed under Article 16 (1) of the Constitution, since, so long as the ban subsists any application made by the petitioner for employment under the State 'was bound to be treated as a waste-paper'.

While equality need be predicated only among persons belonging to the same class it has often proved difficult to categorise persons having identical qualities to constitute a class for the application of the principle. The intricacy of the problem was well illustrated by three recent decisions of the Supreme Court. In *All-India Station Masters' and Assistant Station Masters' Association v. General Manager, Central Railway*²⁷, the Roadside Station Masters of the Central Railway challenged the constitutionality of a notification which enabled the Guards to be promoted to the posts of higher grade Station Masters by means of two channels of promotion while the Roadside Station Masters were given only one usual channel of promotion to attain the same posts. The Court found that the Guards and Roadside Station Masters formed different classes because they were recruited separately, trained separately and have separate avenues of promotion. Das Gupta, J., who delivered the judgment of the Court laid down the test thus :

"Equality of opportunity in matters of employment can be predicated only as between persons who are either seeking the same employment or have obtained the same employment."

In *Kishori Mohanlal Bakshi v. Union of India*²⁸ the Supreme Court went a step further to hold that as between citizens holding posts in different grades in Government service there could be no question of equality of opportunity. In this case, it was found that Income-tax Officers of Class II could not claim a right to be promoted to the posts of Assistant Commissioners on the mere ground that Income-tax Officers of Class I were given direct promotion to the said posts even though the functions performed by the two classes of Income-tax Officers were identical.

In *The State of Punjab v. Joginder Singh*,²⁹ the Supreme Court found that when the same class of employees were kept in two separate cadres there could be no scope for claiming equality of opportunity as between the members of the two cadres, even if they were performing the same functions, receiving the same pay and belong to the same grade so long as there was no integration of the two cadres. In that case schools belonging to two District Boards were taken over by the Education Department of the Punjab Government and the teachers who were previously working in the erstwhile Board Schools were put to form a 'Provincialised Cadre' after declaring them to be State employees. They were given the same grades of pay and allowances as were given to their counterparts in the 'State cadre' who were originally in the Government service. Two sets of rules regulated the service conditions of the two cadres and all matters relating to promotion of lower grade teachers to higher grade teachers were same in both the cadres, but it operated differently as between the members in the two cadres. The Supreme Court by a majority of three to two held that except the identity of grade and pay there was nothing in common between the two cadres and that there was 'no integration of the two cadres either expressly or by necessary implication'. Rajagopala Ayyangar, J., delivering the majority judgment said about the position of the two cadres thus:³⁰

25. *Kunhirishnan Nair v. State of Kerala*, 1964 K.L.T.*1066.

26. (1962) 1 S.C.J. 715 : (1962) 2 A.W.R. (S.C.) 7 : (1962) 2 M.L.J. (S.C.) 7 : (1962) 3 S.C.R. 187 : A.I.R. 1962 S.C. 602.

27. (1960) S.C.J. 344 : (1960) 2 S.C.R. 311 : A.I.R. 1960 S.C. 384.

28. (1962) 44 I.T.R. 532 : A.I.R. 1962 S.C. 1139.

29. (1954) 1 S.C.J. 627 : (1963) 2 S.C.R. (Supp.) 169 : A.I.R. 1963 S.C. 913.

30. *State of Punjab v. Joginder Singh*, (1954) 1 S.C.J. 627 : (1963) 2 S.C.R. (Supp.) 169 : A.I.R. 1963 S.C. 913 at 922.

".....here was no question of *inter se* seniority between members of the two services, nor of any comparison between the two in the matter of promotion for founding an argument based upon Article 14 or 16 (1). They started dissimilarly and they continued dissimilarly and any dissimilarity in their treatment would not be a denial or equal opportunity, for it is common ground that within each group there is no denial of that freedom guaranteed by the two articles "

While there is complete identity as regards the position, grade, salary and functions of the teachers of both the cadres there may not be much substance in treating them as forming two different classes by the mere reason that they are governed by two sets of rules and that they were recruited at two different times by two recruiting authorities. It may be noted that for promotion to the higher grade the conditions in respect of both the State cadre and the Provincialised cadre are the same, namely, that the teacher must be a Matriculate and must have put in service for five years in the Education Department.³¹ So it is apparent that the disability of a teacher possessing the required educational qualifications lies in the fact that he had served for a number of years in the Board's school instead of serving for five years in the State's school. This predicament is explicable only on historical grounds but should history perpetuate a division where the principle of integration ought obviously to command a higher loyalty? There is some doubt also whether this decision is not a departure from what was held by the Court in *All-India Station Masters' case*²⁷ and *Kishori Mohanlal's case*²⁸. In the former it was found that equality can be predicated as between persons who are either seeking the same employment or have obtained the same employment and in the latter it was agreed that the principle of equality is to be applied among persons holding posts of the same grade. If the above two tests are applied in *Joginder Singh's case*²⁹ the teachers in the Provincialised cadre are persons 'who have obtained the same employment' and who are holding posts of the 'same grade' as those in the State cadre. Shah, J. (delivering the minority judgment (for himself and Subba Rao, J.) observed :

"But once the District Board and the Municipal Board School teachers were taken over by the Government of Punjab and an amalgamated Educational Service was evolved, any special provision relating to promotion depending solely upon the source of recruitment and upon no other ground seriously affected the right of the members of the Provincialised cadre to promotion and infringed Article 16, Clause (1) of the Constitution."

4. *Applicability of Article 16 in matters arising after appointment.*—The question whether the principle of equality of opportunity as visualised by Article 16 is applicable in matters arising after appointment to the service, has been considered by the various High Courts of India. They do not agree in their conclusions. There is, however, no conflict of opinion on the point that all the actions of the State facilitating or causing the entering of citizens into the services and all incidental and consequential matters arising before the moment when they are appointed as Government servants, are controlled by the provisions of Article 16. But the point from where the difference of opinion begins is the point starting from the date of such employment or appointment. Some of the High Courts³² maintained the view that Article 16 is applicable only to the matters arising up to the initial stage of engagement in the service but not to matters arising after that initial stage and

31. *Ibid*, p. 927.

32. *N Rudraradhya v State of Mysore*, A.I.R. 1961 Mys 247; *Sambath v. State of Madras*, (1962) 2 M.L.J. 140. A.I.R. 1962 Mad 485, *Hiranmoy Battacharjee v. State of Assam*, A.I.R. 1954 Assam 224. In the last case Deka, J., of the Assam High Court, while determining the applicability of Art 16 to a question of discrimination involved in a termination of service, said "There was no case of discrimination with regard to an employment, because there was no fresh employment, the petitioner being in the service from before nor did he ask for any fresh employment." This view is taken as a specimen to show the line of thinking adopted in all the above cases.

ranging upto the retirement from, or termination of, the service of the servant which are beyond the scope of Article 16 while the other High Courts³³ as well as the Supreme Court³⁴ hold that the entire matter arising out of the appointment of citizens to the Government Service, whether before or after the date of initial employment are to be governed by the provisions of Article 16.

Even though the weight of authority is against the view of the three High Courts there is an arguable case for it in the light of the other provisions of the Constitution and on pragmatic considerations such as maintaining the efficiency, discipline and integrity of the services. During the discussion on Article 16 in the Constituent Assembly, at no time it was suggested by any one that the purpose of Article 16 was to ensure equality and equal treatment even after a person is appointed in the service of Government. On the contrary, there are clear indications³⁵ to show that the article is intended to govern matters arising during the initial stage of appointment or employment. Once a citizen has entered the service he is controlled by the Service Rules and Conditions and by the various provisions of Part XIV of the Constitution. But this does not mean that any kind of inequality and discrimination can be made among the employees in the service. The validity of the Service Rules and Conditions and every act of Government taken thereunder, can always be subjected to the scrutiny of Article 14 of the Constitution. If a rule made is discriminatory or if an act done is done 'with an evil eye and unequal hand', the discrimination or act, as the case may be, can be censured under Article 14.

5. *Reservation of posts in favour of any backward class.*—Article 16 (4) is one of the most controversial provisions of the Indian Constitution and has contributed the expression "protective discrimination" language. This clause is exceptional in the sense that it validates discriminations for certain purposes and thus legalises violation of the sacred principle of equality of opportunity contained in that very same article. It is intended to give a helping hand to the backward class of citizens which is inadequately represented in the services of the State and thus to contribute to ameliorate the conditions of that class. But it was never intended to exist as a source of help to them for all time to come. This transitory nature of this provision is the only justification for its existence. The provisions contained in Article 16 (4) are to be given effect by the State which is expected to be 'prudent and reasonable'³⁶ in such a way that the principle of equality of opportunity is not rendered illusory.

(a) *Backward Class—What does it mean ?*

Any section of the citizens could be given the benefit of reservation if the section satisfied the two conditions prescribed by Article 16 (4), namely, that it possessed the qualities of backward class and that it was not adequately represented in the services under the State. The words 'in the opinion of the State' in Article 16 (4) has reference only to the determination of adequacy of representation but not of backwardness of the relevant class. The obvious inference is that the power to pick out citizens to constitute a backward class must be exercised by the State in conformity with some objective standard and fixed criterion.

The phrase 'backward class' is defined nowhere in the Constitution. The omission was deliberate and was to achieve certain purposes. The Drafting Com-

33. *Madhusudan Nair v. State of Kerala*, A.I.R. 1961 Ker. 203 ; *Pandurang Kashinath More v. Union of India*, A.I.R. 1959 Bom. 134.

34. *Kunj Behari Lal Agarwal v. Union of India*, (1963) 2 S.C.J. 217 : (1963) 2 S.C.R. 1 : A.I.R. 1963 S.C. 518 ; *High Court, Calcutta v. Anul Kumar Roy*, (1963) 1 S.C.R. 437 : A.I.R. 1962 S.C. 1704 and *General Manager, Southern Railway v. Rangachari*, (1961) 2 M.L.J. (S.C.) 71 : (1961) 2 A.W.R. (S.C.) 71 : (1961) 2 S.C.J. 424 : (1962) 2 S.C.R. 586 : A.I.R. 1962 S.C. 36. In the last case *Gajendragadkar, J.*, held : "The narrow construction would confine the application of Art. 16 (1) to the initial employment and nothing else ; but that clearly is only one of the matters relating to employment".

35. Dr. Ambedkar remarked in his speech in the Constituent Assembly regarding Article 16 that every individual who is qualified for particular post 'should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine whether he is fit for the post or not' (in page 702 of VII C.A.D.)

36. VII C.A.D. p.702.

mittee declined to accept the suggestions to change the nomenclature of the phrase by defining it or alternatively, by replacing it by the phrase 'backward community.' Dr. Ambedkar³⁷ was of opinion that in the absence of the word 'backward,' the exception made in favour of reservation 'would ultimately eat up' the general principle of equality altogether. Mr. K. M. Munshi further gave a clarification that backward class would include citizens belonging to all religion and castes.³⁸ Thus the meaning of the phrase is reasonably clear, and the doubt now gathered around it are of artificial creation.

The policy of the entire Constitution is to uphold the lofty ideal of secularism and the laudable principle of non-discrimination and Article 16 (1) and (2) undoubtedly subscribe to it. Even on the face of these bare facts, the regrettable tendency of the State is to reserve posts in the public service in favour of castes and religions even without ascertaining their backwardness. But in *Venkataramana v. State of Madras*³⁹, the Supreme Court struck down the Communal G.O. of the Madras Government which reserved posts for all castes and religions even without ascertaining their backwardness. The impugned order divided the total available number of posts of District Munsifs and allotted a quota to each caste. The petitioner, a Brahmin, was not selected to the post by the operation of the Order even though he possessed better qualification than those of the selected candidates from other castes. The Supreme Court observed that in the circumstances of the case no other caste other than the Harijans and Backward Hindus could be called a backward class and that the ineligibility of the petitioner for any of the posts reserved for other communities was brought about only because he was a Brahmin and not a member of those categories. So the Court found that the ineligibility created by the Communal G.O. was not sanctioned by clause (4) of Article 16 and that it was an infringement of the Fundamental Right guaranteed to the petitioner as an individual citizen under Article 16 (1) and (2).⁴⁰

The practice of granting reservations in favour of castes and religions would produce two undesirable results not sanctioned by the Constitution. It might benefit individuals who are 'well-off in life' merely by reason of their membership in the favoured caste or religion. At the same time, many deserving citizens whose position in life is backward and precarious in all respects might not only be denied the benefits of reservation but they will be also deprived of their legitimate right to equality of opportunity by their mere membership in the so-called forward caste or religion. This is quite an anomalous situation because the sum total of concessional privilege added to the normal rights of the favoured caste is always equal to the quantity of right taken away from the normal rights of the discriminated caste, plus the resultant injury caused to the discriminated caste due to such taking.

(b) *The Quantum of reservation.*—An important question that usually crops up out of the provisions of Article 16 (4) is as to the quantum of reservation to be made, the determination of which is left to the discretion of the State. The provisions were incorporated into the Constitution with the confident belief and full understanding that the reservation should confine to a minority of the posts or appointments.⁴¹ The system of reservation was designed to reduce by a gradual

37. VII C.A.D. 701.

38. *Ibid.*, 697, "It is perfectly clear that the word 'backward' signifies that class of people—does not matter whether you call them untouchables or touchables, belonging to this community or that. . . . We need not therefore define or restrict the scope of the word 'backward' to a particular community. Whoever is backward will be covered by it and I think the apprehensions of the Honourable Members are not justified."

39. (1951) S.C.J. 318. (1951) 1 M.L.J. 625 : A.I.R. 1951 S.C. 229

40. *State of Jammu and Kashmir v. Jagar Nath*, A.I.R. 1958 J. & K. 14. In this case the J. & K. High Court condemned an order which meant to remove communal disparity in a Department of the J. & K. Government because the result of the Order was to disable a member of a particular community from being appointed on the ground that his community was over-represented in the Department.

41. "Therefore the seats to be reserved if the reservation is to be consistent with sub-clause (1), Article 10 (which corresponds to Article 16 (1) of the present Constitution) must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation," Ambedkar, VII C.A.D. pp. 701, 702.

process, the disparity in the matter of representation of 'any backward class of citizen's in the public service', and also to remove the then existing impediments which stood in the way of their entering into the public service. The Constitution envisaged that the provisions of Article 16 (4) were to be kept within reasonable bounds so as not to materially affect the operation of the provisions of Article 16 (1). Whether Article 16 (4) has transgressed or travelled out of its allotted sphere of operation is a justiciable matter.⁴²

According to Dr. Ambedkar, even at the time when the Constitution was drafted and when the Federal Court was in existence, reservation of only a minority of posts was permitted. Since the operation of Article 16 (4) tends to reduce the existing inequality in the service with the passing of time, the number of posts reserved for the backward class at a particular time must naturally show a tendency of proportional diminution year after year.⁴³ Therefore, proportionately with the diminution of the percentage of inequality in the service the number of posts reserved must be reduced. A stage will then come when the system of reservation can cease to exist when inequality has ceased to exist from a practical point of view. (Because a certain amount of inequality will at all times exist, and an absolute equality is an impossibility). The provisions of Article 16 (4) are from this point of view to be considered purely transitory or temporary in nature and even during the period of its effective operation, the State is permitted to make reservation covering only a small percentage of the total available posts in the services under the State to which appointments are to be made. Such an approach is essential for not depriving citizens who are left out of the 'backward class' of the right of equality of opportunity on the one hand, and to maintain the efficiency of the services on the other. The fair determination of the Constitution makers to give a reasonable application to the provisions of Article 16 (4) without compromising the efficiency of the services is evidenced by Article 335 which commands that the claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration 'consistently with the maintenance of efficiency of administration in the making of appointment to services and posts in connection with the affairs of the Union or of a State'. Since the vast majority of the members of the Scheduled Castes and Scheduled Tribes would come under the backward class category under Article 16 (4) Article 335 has an indisputable reference to Article 16 (4) also. The propriety, and rather the necessity, of reading both the Articles together is demonstrated by clause (4) of Article 320 which provides that nothing in clause (3) of Article 320 shall require a Public Service Commission 'to be consulted as respects the manner in which any provision referred to in clause (4) of Article 16 may be made or as respects the manner in which effect may be given to the provisions of Article 335.'

While it has been judicially clarified that the command of the Constitutional provision under clause (4) of Article 16 is to confine any system of reservation to a minority of the appointments or posts, the Central Government introduced a system of reservation which though initially purported to reserve only a minority of posts, ultimately resulted in the reservation of almost the entire posts. The validity of such a system of reservation was challenged in *T. Devadasan v. Union of India and another*⁴⁴. In this case the prospects of the chances of promotion of the

42. "If the local Government included in this category of reservation such a large number of seats, I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the Court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner," Ambedkar, VII C.A.D. 702.

43. The principle of proportional diminution is adopted by the Constitution in Article 336 which provides for reservation in favour of Anglo-Indian community. The article states that the reservation which existed in favour of them before August 15, 1947, shall continue for two years after the commencement of the Constitution. "During every succeeding period of two years, the number of posts reserved for the members of the said community in the said services shall, as nearly as possible, be less than ten per cent. than the numbers so reserved during the immediately preceding period of two years. Provided that at the end of ten years from the commencement of this Constitution all such reservation shall cease."

44. A.I.R. 1964 S.C. 179.

petitioner, who, was a Class IV employee in the Central Services, was obviously affected by the operation of the so-called 'carry forward rule', introduced by the Government of India. While the rule prescribed that 17½ per cent. of the posts available in a particular year is to be reserved for the Scheduled Castes and Tribes in cases where those reserved posts are not filled due to unavailability of persons of such castes and tribes, such unfilled portion of the reserved quota of posts is to be added to the succeeding year's reserved quota of reserved posts, even though appointments to the unfilled posts of the first year can be made on the basis of merit from among the total applicants of that year. Such a process of accumulation of reserved but unfilled posts can be carried to the third year in which the unfilled portion of the reserved quotas of the previous two years can be added to the third year's reserved quota. In the present case as a result of the application of the carry forward rule above 80 per cent. of the total appointments of the relevant year was accumulated and set apart as reserved for Scheduled Castes and Tribes. The Supreme Court condemned the rule and promptly declared it unconstitutional. Delivering the majority judgment Mudholkar, J., said:⁴⁵⁻⁴⁶

"The guarantee (under Article 16 (1)), is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of the recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or disturb unduly the legitimate claims of other communities."

The Court then clearly explained the operation of clauses (1) and (4) of Article 16. It maintained that an unlimited reservation would in effect 'efface the guarantee contained in clause (1) or at best make it illusory.' Since no provision of the Constitution or any enactment could be so construed as to destroy another provision contemporaneously enacted therein, the over-riding effect of clause (4) over clauses (1) and (2) could only extend to the making of a reasonable number of reservation of appointments and posts 'in certain circumstances.'

Subba Rao, J., did not agree with the majority view. In a separate dissenting judgment, His Lordship observed thus :⁴⁵⁻⁴⁶

"Reservation made in one selection or spread over many selections is only a convenient method of implementing the provision of reservation. Unless it is established that an unreasonably disproportionate part of the cadre strength is filled up with said castes and tribes, it is not possible to contend that the provision is not one of reservation but amounts to an extinction of the Fundamental right. There is neither any allegation nor evidence in this case to that effect."

This view apparently ignores the fact that the provisions contained in Article 16 (4) is a special provision in the nature of an exception to the general principle of equality of opportunity. When the majority posts are reserved the very conception of special provision will cease to prevail because when it operates favourably to the majority of the citizens it can well be called a general provision accompanied by an implied special provision that minority of the posts are to be filled by everyone on the basis of merit. The idea of permitting the reservation of any number of posts in favour of certain castes and tribes until a stage is reached when it could be established that 'an unreasonably disproportionate part of the cadre is filled up with the said castes and tribes' will inevitably introduce a dangerous phenomenon which would even tend to suspend the operation of the general principle of equality of opportunity for years together.

(c) *Reservation of selection posts.*—Does Article 16 (4) permit the making of reservation of selection posts in the service? The Supreme Court answered the question in the affirmative by its decision in *General Manager, Southern Railway and*

41.
Article 16.
41.
T. Devadasan v. Union of India, A I R. 1964 S.C. 179 at 187, 192.

another v. Rangachari⁴⁷, in which a circular issued by the Railway Board ordering reservation of selection posts in the Railway Service in favour of the members of the Scheduled Castes and Scheduled Tribes, was held to be *intra vires* the provisions of Article 16 (4).

In this case, the petitioner Rangachari who was a Court Inspector was promoted to the post of higher grade Court Inspector after his being interviewed by the Selection Committee, as he was placed as No. 1 in the list prepared by the Committee. After the promotion had taken place, the impugned circulars were issued and in the light of those circulars the Selection Committee decided to consider the case of an employee belonging to the Scheduled Caste for the purpose of promoting him to the higher grade. The effect of such consideration would be, the petitioner apprehended, a reversion of the petitioner. The petition filed by him under Article 226 before the Madras High Court was allowed and a *mandamus* was issued on the ground that the circulars were *ultra vires* the provisions of Article 16 (4). From that judgment this appeal was filed under Article 132 (1) after obtaining a certificate.

The main question which came up for consideration of the Supreme Court was that of the scope and applicability of Article 16 (4) on the strength of whose provisions the impugned circulars were issued. The Court by a majority held that the power of reservation which is conferred on the State under Article 16 (4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. The "posts" cannot mean ex-cadre posts but the context requires that "posts" should be deemed to be posts inside services and not outside them. The Court admitted that the provision is to be read along with Article 335. Delivering the majority judgment Gajendragadkar, J. (on behalf of himself, Sarkar and Das Gupta, JJ. but with Wanchoo and Rajagopala Ayyangar, JJ., dissenting), said:⁴⁸

"The condition precedent for the exercise of the powers conferred by Article 16 (4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services. This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of service but that they should aspire to secure adequate representation in selection posts in the services as well. In the context the expression 'adequately represented' imports considerations of 'size' as well as 'values,' numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one."

Wanchoo, J., materially disagreed with the majority view and held that Article 16 (4) only authorises to make reservations either by reserving appointment to the services or by reserving posts in the services. Appointments, in his opinion mean only the initial appointments to a service, for a person is appointed only once in a service and thereafter there is no further appointment. Therefore reservation of appointments means reservation of a percentage of initial appointments to the service. 'Posts' refer to the total number of posts in the whole of the service and when reservation is by reference to posts it means reservation of a certain percentage of posts out of the total number of posts in the service. The reason why these two methods are mentioned in Article 16 (4) is that while by the method of reservation of appointments the benefits of adequacy of representation can be achieved only within a longer period of time, by the method of reserving posts the representation is made adequate in a much shorter period. So Article 16 (4) can only mean that the State has the power thereunder to reserve numerically a certain percentage of

47. (1961) 2 M.L.J. (S.C.) 71 : (1961) 2 An.W.R. (S.C.) 71 : (1961) 2 S.C.J. 424 : (1962) 2 S.C.R. 586 : A.I.R. 1962 S.C. 36.

48. *General Manager, Southern Railway v. Rangachari*, (1961) 2 M.L.J. (S.C.) 71 : (1961) 2 An.W.R. (S.C.) 71 : (1961) 2 S.C.J. 424 : (1962) 2 S.C.R. 586 : A.I.R. 1962 S.C. 36 at 44.

appointments or posts in the manner as indicated above. The State has no power to 'split the services into various grades and make reservation in each grade' merely because of the use of the word 'Posts'.

Rajagopala Ayyangar, J., agreed with the views expressed by Wanchoo, J. He held that a restriction on a guaranteed freedom should be narrowly construed so as to afford sufficient scope for the freedom guaranteed. Every appointment in the service must naturally be to a 'post' in the service, because 'there cannot be an appointment in the air'. In some of the top grades there are single posts in the service. If at any point of time the incumbent is not a member of the backward class, it would certainly be a case of inadequate representation as regards that post which would mean that such posts which are single may be reserved for all time to be held by members of the backward class, because if at any moment such a person ceases to hold the post there would be inadequate representation in regard to that post. So 'inadequacy of representation' refers to a quantitative deficiency in the representation of the backward class in the service taken as a whole which can be remedied only by reservation of initial appointments, and not to an inadequate representation at each grade of service or in respect of each post in the service. His Lordships concluded thus⁴⁹:

"If an inadequacy exists today, to give retrospective effect to the reservation, as the impugned notification has done, would be to redress an inadequate representation which took place in the past by an order issued today. In my judgment that is not contemplated by the power conferred to reserve which can only mean for the future."

Dr. Ambedkar said of Article 16 (4) that it was 'provision made for the entry of certain communities which have so far been outside the administration'. The aim of Article 16 (4) is to facilitate the entry into the services, of the backward class of citizens who were excluded from the services so far, but it is very doubtful whether it aims at remedying inadequacy of representation in all grades, ranging from the grade of the peons to that of a Government Secretary. The qualitative inadequacy can be remedied only by using either of the two devices, i.e., by promoting employees of the lower grades to higher grades by overlooking the principles of seniority and efficiency, or by direct selection of officials to higher levels of services so as to place new hands over the employees already in the services. Whatever may be the basis of implementation of these two devices, it must not be on the basis of reservation because in the first case, it would frustrate the hopes of those employees for promotion in the services on the basis of seniority and efficiency; and in the second case, not only would it reduce the chances of promotion of existing employees but would also deprive the qualified applicant of the opportunity to get a senior post, and so at that level of the right of equality of opportunity. These difficulties which are of great importance as far as the right of equality is concerned, dissuade one from accepting the majority view and should inevitably persuade to accept the minority view in the above case.

(d) *Measures suggested to improve the conditions of backward class*—The present pressing problem which calls for the immediate attention of the authorities responsible for the faithful implementation of the provisions of Article 16 (4) is to work out a proper criterion to constitute a backward class in whose favour the reservation could be constitutionally made. The appreciation of the import of the word 'Class' as a synonym for 'Caste' would precipitate unconstitutional discrimination. The fallacy in granting reservation to castes and religions could be demonstrated by two logical reasons. In the first place it would not be precise to impute backwardness to all the members of a caste alike and without exception. Secondly the selection of a particular caste to be designated as a backward class from among the numerous castes should necessitate an investigation into the relative backwardness or forwardness of that caste in comparison with the other castes. A true and rational investi-

49. *General Manager, Southern Rly v. Rengachari*, (1961) 2 M L J (S C) 71 : (1961) 2 An W R. (S C.) 71 : (1961) 2 S C J. 424 : (1962) 2 S C R. 586. : A I R 1962 S C. 96 at 49.

gation into the backwardness of any caste must inevitably mean an investigation into the backwardness of every family and every individual composing that caste. Thus the process of determination of the backwardness of even a single caste would ultimately result in the investigation into the social, economic, educational, occupational and other kinds of backwardness of each individual citizen of the entire country. If such a scientifically prepared data is available the grouping of the really backward citizens from the entire society belonging to all the castes and religions, to mould out a backward class for the purpose of Article 16 (4) would never be a difficult task. In such a case, since the same standard of measurement is applied to ascertain the backwardness of all citizens, a backward citizen belonging to one caste would make no difference from his counterpart belonging to another religion⁵⁰. Then a criterion of caste would automatically prove to be superfluous and irrelevant. So the first step that could be taken to improve the conditions of the backward class in the fields of public employment is to appoint a proper agency to investigate and report in the lines as suggested above.⁵¹

According to the practice adopted by the various States⁵², persons possessing inferior qualities and qualification than those generally prescribed for appointment, are absorbed to the public service by virtue of the reservation system. It would be better to give educational and financial help from the beginning of the career of the backward citizen and to equip him to compete with the rest of the qualified citizens on footing of equality at the stage of appointment. This would prevent the inherently incompetent backward citizen with the lowest intellectual aptitude from being appointed in the service under the pretext of backwardness.

In order to respect the right of every citizen to the equality of opportunity, and to keep up the efficiency of the public service it is highly essential to limit the quantum of reservation to the irreducible minimum, and to set up a time limit preventing its indefinite continuance⁵³. Otherwise, a privileged class, indolent and indifferent, and always looking to the mercy of reservation, may come into existence. No reservation may be granted for appointment to posts the holding of which require skill and specialised qualifications. This ought to be so, because an unqualified backward citizens, appointed in the post of an engineer, cannot be expected to design and construct a "backward bridge or dam".

Since it is a well-accepted fact that the backwardness of an Indian citizen is mainly, though not solely, due to his economic incapacity⁵⁴, all efforts should be made to

50. It may be noted that the Backward Classes Commission established in 1953 under Article 340 to investigate into the conditions of backwardness of the citizens reported a list of castes and sub-castes to be treated as the backward class. According to the Commission's estimation more than 85 per cent. of the whole population, including women, was to be treated as the backward class. The Ministry of Home Affairs expressed disappointment with the Report of the Commission because it had acted contrary to the purpose for which it was created. (Report of the Backward Classes Commission (R.B.C.C.) Vol. I & Memorandum of the R.B.C.C. Ministry of Home Affairs, Government of India). So from the experience gained from the working of the B.C.C. it can be suggested that any Commission or agency that may be constituted in the future for the purpose must be given clear instructions to achieve the purpose.

51. The method suggested may indirectly satisfy the claims of the backward castes also. If the backward citizens of a particular caste form a substantial part of the newly constituted backward class, as suggested above, naturally that caste can capture a substantial number of the reserved posts.

52. According to information given by the Central Government to the Members of Parliament, eight States in India have now adopted the economic criterion as a sole test to detect the backwardness. —The "Hindu" (English daily), dated 2nd December, 1965.

53. The right approach to the problem of giving protection to backward class of citizens was explained by Mr. Jawaharlal Nehru as early as in 1950 while he spoke of the matter in the Constituent Assembly thus : "It is right and important that we should raise the level of backward groups in India and bring them up to the level of the rest. But it is not right that in trying to do this we create further barriers, or even keep on existing barriers, because the ultimate objective is not separatism but building up an organic nation. . . . I do not think it will be a right thing to go the way this country has gone in the past by creating barriers and by calling for protection. As a matter of fact nothing can protect such a minority or a group less than a barrier which separates it from the majority. It makes it a permanently isolated group and it prevents it from any kind of tendency to bring it closer to the other groups in the country." VII C.A.D. 323.

54. *M.R. Balaji v. State of Mysore*, (1963) 1 S.C.R. (Sup.) 439 : A.I.R. 1963 S.C. 649.

improve his economic stability through the multifarious agencies of the State. All helps to induce them to enter into the fields of agriculture and industry, and all facilities to get good education, such as the award of scholarships, may be given from the States to the backward class.

Conclusion.—During the short span of time since its enactment, Article 16 has done much for securing equality of opportunity in public employment. Out of the 15 reported cases that have come up before the Supreme Court for its verdict five cases were decided in favour of the applicants. In three cases the Court was divided in its opinion. There is a view, not totally unjustifiable, that the vague, obscure and undefined phraseology used in Article 16 has often tended to defeat the excellent intentions of the framers of the Constitution. In making orders under Article 16 (4) in favour of 'backward class' the States must show much more 'prudence and reasonableness'. In determining the backwardness of citizens a proper criterion conducive to, and not defeating, the rights of the rest of the society to the equality of opportunity must be found out and adopted. And that criterion must be based on objective standards and accurate data. At the same time, the Courts may be vigilant and keen in restricting an unbridled and unruly application of the provisions of Article 16 (4) by the Executive. The Courts may recognise, if not done so by the Executive, the purpose for which and the circumstances in which Article 16 is inserted into our Constitution even though there is an equally effective equality provision contained in Article 14. The ultimate aim of all the provisions contained in Articles 14, 15, 16 and 29 (2) is to make India an indivisible and organic nation free from the vices of casteism, communalism and parochialism and to create a society in which equality, not between communities and groups, but between citizens, could flourish.

THE LEGISLATIVE SUPREMACY IN THE ARTICLE 21 OF THE CONSTITUTION.

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The constitutional guarantee of the liberty of person has generally been in the form of the observances of the procedural safeguards envisaged against the violation of it. In the modern times the State is expected to make the impact on the freedom of the individual in the interests of the community in multifarious ways. Accordingly, the protection of personal liberty is sought not in limiting the State from making laws which may give occasion for the deprivation of personal liberty but in making the State to observe meticulously the procedure necessary to be followed before a person can be deprived of his personal liberty. The constitutional safeguard to the liberty of person in England, the parent of the Indian constitutional system, has always been by way of the effectiveness with which the writ of *habeas corpus* is enforced, against the improper or arbitrary imprisonment. Also, in the Constitution of United States of America the writ of *habeas corpus* is a permanent remedy in normal times,¹ and in addition, the judiciary has the power to scrutinise the substantive laws under the 'due process' clauses of Vth and XIVth Amendments. A similar pattern, though different in matters of details, is secured in favour of personal liberty by the Constitution of India through the operation of the Articles 21 and 32.

In the study here the way in which and the circumstances in which the Article 21 of the Constitution of India has been interpreted in order to maintain the supremacy of the Legislature on the British pattern in the matter of the deprivation of personal liberty has been examined. The question examined here essentially deals with the major premise in the context of the decisions of the Supreme Court on which it is found to depend rather precariously. To this is added an investigation of the extent to which the Judiciary and the Executive can be the rivals of the Legislature in the making or regulation of 'law' in the Article 21.

The Law-making Agency under the Article 21.—The Article 21 lays down,—“No person shall be deprived of his life or personal liberty except according to the procedure established by law.” There is nothing in the words of the Article 21 which in any way suggests the kind of law by which the procedure for the deprivation of the personal liberty is to be established. In *Gopalan v. State of Madras*,² the Supreme Court had been set to examine whether the term 'law' in the Article 21 referred to the enacted law only and exclusively or whether it also referred to law made by other sources or made subject to some extraneous principles. It had been contended that that 'law' was not to be evaluated only on the considerations of the source or the law-making agency but also with reference to the content of it: it must be 'just,' 'natural' or 'proper' law. It was also contended that if the term 'law' was interpreted to mean only the enacted law, it would be

1. Article 1, section 9.

2. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 : (1950) S.C.R. 88.

always competent for the Legislature to pass a law laying down a thoroughly irrational and arbitrary procedure opposed to the elementary principles of justice and fairness and the people would have no protection whatsoever.

An analysis of the majority judgments shows the unanimity of the Judges in the interpretation that 'law' in the Article 21 is not to incorporate the implications of 'just', 'natural law' or other such expressions. But, at the same time on the score of the law-making agency under the Article 21, Kania, C J.,³ and Das, J.,⁴ regarded 'law' to mean 'enacted law' while Sastri⁵ and Mukherjea,⁶ JJ., defined it to be 'State-made law'. It would be observed that 'State-made law' can be one made by the Executive or the Judiciary also in addition to the Legislature. However, by holding that the Article 21 was a limitation on the Executive primarily in that it should act only in accordance with the procedure established by law, and by observing that the Constituent Assembly had after detailed examination rejected the 'due process' clause which could have given the Judiciary the right to share in the law-making functions of the State as in the U.S.A., the majority judgments singled out the legislative organ of the Government as the sole law-making organ of the State for the purpose of the Article 21. In his dissenting judgment, Fazl Ali, J.,⁷ defined 'law' in Article 21 to mean 'valid' law and held that whatever be the source of such a law the procedure set by it for the deprivation of personal liberty must incorporate the basic principles of criminal justice in order to be 'valid' law. Such basic principles would be binding on the Legislatures and the Judiciary would be entitled to examine whether any enactment violated such basic requirements or not.

The judgments in *Gopalan v. State of Madras*⁴⁻⁷ point out the fact that two interpretations on the nature of the law-making machinery under the terms of the Article 21 are always possible. One on the pattern of the parliamentary supremacy of England and the other on the American pattern in which the Judiciary and the Legislature together take part in the law-making functions. It was only a question of preference by the majority of the pattern obtainable in England.

Though the Supreme Court has in its judgment in *Kharak Singh v. State of U.P.*,⁸ modified its opinion in the *Gopalan's case*³ on the vital definition of the 'personal liberty' in Article 21, yet its judgments⁹ continue to favour the interpretation of 'law' given by the majority judgments in the *Gopalan's case*.³

An examination is now made of the attempts of bringing the Judiciary and the Executive into the law-making field under the Article 21 and the judgments thereon by the Supreme Court.

The Judicial Law-making and Judicial Review under the Article 21.—The challenge to the primacy of the Legislature in the Article 21 by the Judiciary, as has been already alluded, is not directly possible. The Article 21 does not require any reasonable procedure to be established by the law for the deprivation of the personal liberty, nor does it say of any due process of law. It may be mentioned that the require-

3. (1950) S C J. 174; (1950) 2 M L J. 42; (1950) S C R. 88 at p. 108.

4. *Ibid.*, at p. 308.

5. *Ibid.*, at p. 199.

6. *Ibid.*, at p. 278.

7. *Ibid.*, at p. 162 et seq.

8. (1964) 2 S C J. 107; (1964) 1 S C R. 332; A.I.R. 1963 S C. 1295.

9. *Ram Singh v. State of Delhi*, (1951) S C J. 374; *Kharak Singh v. State of U.P.*, *Op. cit.*,

ment of 'reasonableness' has always been interpreted in the English system of law to empower the Judiciary to review the proper exercise of the power by the authority concerned.¹⁰ The Supreme Court of India has in interpreting the clauses (2) to (6) of the Article 19 which empower the State to lay down 'reasonable restrictions' on the freedoms enumerated in the Article 19 (1) held that while it was for the Legislature to define the restrictions, at the same time the Court would examine whether the restrictions were properly reasonable or not.¹¹ No such power of sharing the law-making functions of the State has been claimed by the Court under the Article 21.

Moreover, the Supreme Court has in a number of cases, like, *Ram Singh v. State of Delhi*,^{9-a} *Collector of Malabar v. E. Ebrahim*¹² and *Kharak Singh v. State of U.P.*^{9-b} maintained the opinion in *Gopalan's case*⁴⁻⁷ which rejected the argument that because personal liberty is a term sufficiently comprehensive to include the freedoms enumerated in the Article 19 (1) and because its deprivation may also in some cases result in the extinction of those freedoms, therefore, any 'law' which deprives a person of his personal liberty should be also subject to the judicial review as to the reasonableness under Article 19. A contrary view which can be taken by the Supreme Court at any time in future would give to the Judiciary wide powers of review under Article 21 as well whenever the procedure would violate the freedoms of Article 19 (1).

Advocating for such a change it has been observed¹³ that before the First Amendment of Constitution of 1951, when under the clause (2) of the Article 19 reasonable restrictions could not be put on the freedom of speech and expression in the interests of public order because 'public order' was not mentioned as one of such conditions in the said clause (2), there seems to have been a good justification for the decision in the *Gopalan's case*³ followed in *Ram Singh v. State of Delhi*^{9-a}. Since every law which deprived a person of his personal liberty under the Article 21 if it was to be subject to the requirements of Article 19 (2) it would be constitutional only if the detention was necessary in the interests of the 'security of State'. In *Ramesh Thappar v. State of Madras*¹⁴ the Supreme Court had distinguished the 'security of State' from 'public order.' Since threat to the 'security of State' refers to more serious activities than threat to 'public order', the application of Article 19 along with the Article 21 would have provided constitutional loop-hole in favour of unsocial, communal and Communist violence which was thriving in the years around 1950. Now, since the First Amendment of the Constitution of 1951 the State can impose reasonable restrictions on the freedom of speech and expression in the interests of 'public order' or for 'incitement to an offence,' it has been suggested, there would not be any harm in subjecting 'law' in Article 21 to the conditions of judicial review under the Article 19.

9-a. (1951) S.C.J. 374.

9-b. 1964 2 S.C.J. 107.

10. *Leversidge v. Anderson*, L.R. 1942 A.C. 206.

11. *Ghintamanrao v. State of M.P.*, (1950) S.C.J. 571 : (1950) S.C.R. 759.

12. A.I.R. 1957 S.C. 688.

13. Tripathi, *Preventive Detention : The Indian Experience*, *American Jour. of Comp. Law* Vol. 9, 1960, p. 219.

14. (1950) S.C.J. 418 : (1950) S.C.R. 594.

It has also been pointed out,¹⁵ that a similar distinction between the Article 31 and the Article 19 which had been propounded in *Gopalan's case*³ and followed in cases, like, *Chiranjit Lal v. Union of India*¹⁶ and *State of Bombay v. Bhanji*¹⁷, by the Supreme Court now stands reversed by its decision in *Kochunni v. State of Madras*¹⁸. Accordingly, now the laws which deprive a person of his property under the Article 31 would be subject to the powers of judicial review under Article 19 (5). This provides a basis for a change in the relationship between the Articles 21 and 19 also.

It may be added here that such a change in the attitude of the Supreme Court would not involve any radical innovation. Under the Article 14, which the Supreme Court has held¹⁹ to be applicable to the 'law' made under Article 21, the Judiciary can already examine whether such a law makes a reasonable classification or not from the point of view of the equality before law. If the Article 19 is also made applicable to 'law' under the Article 21 the Courts will have only an added power of review when the 'law' also deals with the freedoms mentioned in Article 19 (1).

In discussing the position of Judiciary as a possible rival of Legislature under the Article 21, the precedent making power of the judicial decisions may also be alluded to. The precedents have the authority of law because the inferior Courts are bound by the expositions or interpretations of law by the Courts superior to them. In the field of personal liberty, as in any other, the Courts have vast opportunity of fixing the limits of law or filling the gaps left by a law. For example, in *Krishnan v. State of Madras*,²⁰ the Supreme Court laid down that the general rule regarding a temporary statute was that in the absence of special provisions to the contrary the proceedings which were being taken against a person would *ipso facto* terminate as soon as the statute would expire. Therefore, the preventive detention which would be but for the Act authorising it illegal, cannot be continued beyond the expiry of that Act itself. This general rule depends upon the understanding of the Court and obviously regulates the law of personal liberty under the Article 21. Later on, it has been applied in cases, like, *State of Bombay v. Hemen Sanilal*²¹, or, *Gopi Chand v. Delhi Administration*²².

However, the precedents though they have the force of law are always subordinate to the enacted law and exist only so long as they are not contrary to statute law.

The above analysis will show that for the present the Judiciary is in no way a challenge to the supremacy of the Legislature under the Article 21.

Executive Legislation under the Article 21.—In the English constitutional system of Parliamentary supremacy any claim of legislative power by the Executive is unthinkable. Basically, the liberty of person in England is maintained by excluding the arbitrariness of the Executive in dealing with the laws of the land and by relying on the Parliament that it will watch the liberties of the people from being

15. Nathenson, *Northwestern University Law Review*, Vol 56, 1961, p. 194.

16. (1951) S.C.J. 29 : (1950) S.C.R. 869.

17. (1955) S.C.J. 10. (1955) 1 S.C.R. 777.

18. (1961) 2 S.C.J. 443 : (1960) 8 S.C.R. 887 : A.I.R. 1960 S.C. 1080.

19. *Gopalan v. State of Madras*, (1950) S.C.J. 174, *State of W.B. v. Anwar Ali*, (1952) S.C.J. 55 : (1952) S.C.R. 284

20. (1951) S.C.J. 453.

21. A.I.R. 1952 Bom 16.

22. (1959) S.C.J. 831 : (1959) 2 S.C.R. Supp. 87 : A.I.R. 1959 S.C. 609.

violated in a manner contrary to the great Charters, viz., the Magna Carta, the Petition of Right and the Bill of Rights.

In the U.S.A., the same has been achieved on the basis of the doctrine of separation of powers and constitutional trust. The Constitution defines the different organs which are entrusted with the legislative, executive and judicial functions of the State.²³ Further, under the maxim *delegatus non potest delegare* it is not possible for the Legislature to delegate its functions to any other body. Therefore, unless the Constitution is changed the defined constitutional agencies are to perform their functions only and exclusively.²⁴

In the Constitution of India, there is no rigid separation of powers as in the U.S.A. and, at the same time, instead of Parliament as in England both the Legislature and the Judiciary are relied upon to protect and maintain the liberties of the people in accordance with the Constitution. The approach of the Supreme Court has been quite rigid in excluding the Executive from making any claims to legislative powers under the Constitution and more so in the field of the fundamental rights.²⁵ In *Gopalan v. State of Madras*²⁶ the Supreme Court had made it clear that in general the Article 21 was constitutional limitation on the Executive and it gave all the law-making functions to the Legislature. While the Legislature is free to lay down the procedure of its choice subject to other requirements of the Constitution the Executive must act according to such procedure.

The Executive if it tries to exercise legislative powers can do so in two ways. In the absence of a law under the Article 21 it may make Rules for its guidance without waiting for the Legislature to do so. Else, it may be delegated the authority to make the Rules or law by the Legislature. On both aspects the Supreme Court has given forceful judgments.

In *Kharak Singh v. State of U.P.*²⁷, the validity of the U.P. Police Regulations made without legislative sanctions had been in challenge in so far as they violated the personal liberty under the Article 21. The respondents argued that if any Regulation violated the Part III of the Constitution simply because it had been made by the Executive, the Regulation should be upheld if it was in the interests of the general public and public order and enabled the police to discharge its functions and duties in an efficient manner. The Regulations were contended to be reasonable in all respects.

The Supreme Court proceeded with the view²⁸, that if the "impugned Regulations constitute an infringement of any of the freedoms guaranteed to the petitioner by the Constitution then the only manner in which this violation of fundamental right could be defended would be by justifying the impugned action by reference to a valid law, i.e., be it a statute, statutory rule or a statutory regulation". In other words, it will be the unconstitutional activity which will be before the Court for examination and for adjudication. Such an activity must be justified on the basis of the constitutional imperatives.

23. *Springer v. Govt. of Phillipines Island*, 277 U.S. 189.

24. Cooley, *Constitutional Limitations*, Vol. I, p. 224.

25. *Rashid Ahmed v. Municipal Board*, (1950) S.C.J. 324.

26. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 : (1950) S.C.R. 8

27. (1964) 2 S.C.J. 107 : A.I.R. 1963 S.C. 1295.

28. *Ibid* at p. 1299.

In the present case, the respondents had admitted that the Regulations had been made for the guidance of the police without any legislative sanction. The Supreme Court therefore, refused to examine the reasonableness of the Regulations on their merits for their validity under the Constitution on the ground that to do so would amount to giving recognition to the power of making laws by the Executive simultaneously with the Legislature under the Article 21 and also otherwise.

It would be thus observed that the Supreme Court has maintained the constitutional proposition solidly entrenched in the English and the American constitutional law that the Executive has no capacity of making laws on its own authority in a way which would violate the fundamental rights of the people.

The other query referred to earlier, pertains to the degree to which the Legislature can delegate its own powers of making law to the Executive under the Article 21. The Supreme Court had the occasion to give its Advisory Opinion on this point in *Re Delhi Laws Act*, 1912²⁹; in 1951. In substance, it held that by the Article 245 the Constitution has assigned the law-making power under the Constitution exclusively to the Parliament and the State Legislatures. The Legislature being a creation of the Constitution exists under the supremacy of the Constitution, unlike in England, and cannot delegate or part with their essential legislative functions. The essential legislative functions deal with the determination of the legislative policy behind any law and the formulation of the policy into a rule of conduct. In the field of liberty of person, the prescribing of an offence for some activity and the providing of punishment for the same are essentially legislative functions. However, there can be a delegation of power in the nature of subordinate legislation, like, the making of Rules and Regulations for carrying out the provisions of an enactment or the delimiting of the new areas to which the enactment would be applicable on the happening of some contingency.

It would thus be observed that in its effect the Advisory Opinion of the Supreme Court in *Re Delhi Laws Act*, 1912²⁹, excludes the possibility of the Legislatures venturing to favour the Executive by granting to it the legislative functions and thereby affording to it the power of making law laying down the procedure for the deprivation of personal liberty indirectly.

In concluding, it may be observed that the interpretations of the Article 21 show that the Supreme Court has by its decisions maintained the legislative supremacy in laying down the procedures for the deprivation of personal liberty much on the pattern obtainable in England. It has firmly rejected the attempts to introduce the powers of review by the Judiciary of the intrinsic merits of the legislative enactments either on the pattern followed by it in the matter of 'reasonable restriction' under the Article 19 by introducing it along with the Article 21, or on the pattern of the 'due process of law' as in the Constitution of the United States. The Supreme Court has by its decision in *Kharak Singh's case*³⁰ forestalled any claim of legislative function by the Executive even when the Rules may be just and reasonable and when the Constitution lays down that the laws may be made by the 'State' without specifying exactly the agency. It is also not possible for the Legislature to bestow by delegation the legislative functions on the Executive with regard to 'essential legislative functions' which have to be exercised by the Legislature itself.

29. (1951) S.C.J. 527.

30. (1964) 2 S.C.J. 107 ; (1964) 1 S.C.R. 332 : A.I.R. 1963 S.C. 1295.

The present constitutional position depends on the continued acceptance by the Supreme Court of three propositions. First, 'law' in the Article 21 is to mean only the law enacted by the Legislature. If it is interpreted to mean 'State-made law' and the latter is interpreted to include all the three organs, Legislature, Executive and the Judiciary, the situation would change. Secondly, the Article 19 is kept away from any application when the procedure established by law under the Article 21, also offends the freedoms guaranteed by the Article 19 (1). Thirdly, the term 'law' is not interpreted to carry with it the implications of 'just', 'ideal', 'natural', or 'proper' law. Otherwise, the Judiciary will obtain the power of examining the merits of the enacted law as it is available to the Judiciary in the U.S.A., under the 'due process of law' qualification of the liberty.

THE LATE SHRI LAL BAHADUR SHASTRI.

Shri Lal Bahadur has steered the destiny of the nation through stormy seas though at the helm only for a short period of nineteen months. When he became Prime Minister he had not the halo of his predecessor. He was not cast in the heroic mould and he had not made any impact outside the country. And not many ventured to forecast the great reputation he has made and the success he has achieved. Born of humble parents he was very much a homely, home-spun, human personality. Scorning delight and living laborious days he never forgot that he was of the people and always belonged to the people. He succeeded to a legacy of unsolved problems, both external and internal. But he was never dismayed. He had the gift of unflinching courage, the humility to listen to the various view-points, and the capacity to make his own decisions. A man of sterling character and integrity dedicated to the cause of peace he was neither timorous nor hesitant when he was called upon to face the situation arising out of the undeclared war between our country and Pakistan. Even his worst critics will have to admit that he has done remarkably well in handling all the problems. "Even the ranks of Tuscany can scarce forbear to cheer."

Shri Lal Bahadur had to deal with the long-pending question of the Stateless persons of Indian origin in Ceylon ; he had to face the deteriorating relationships between India and Nepal ; he had to find a solution to the question of Indians and Indian property in Burma ; and he had also to meet the serious misgivings that came up in the wake of the language policy of the Government. Above all he had to face the perpetual threat of danger to the country by the unholy collaboration of China and Pakistan. That he has tackled these problems with considerable success cannot be denied.

He had never aspired for high office. When he could not avoid it he conducted himself in a manner worthy of emulation. He showed a wonderful sense of constitutional propriety when he gave up office in the wake of the Ariyalur Railway disaster though he was not in the least to blame. It was to vindicate the principle that the Minister as head of his Department is ultimately responsible for the functioning of the Department and the acts of its employees. He never allowed personal friendship to come in the way of what he believed to be his duty to the country, as seen from his acceptance of the resignation of the former Finance Minister though "in agony and anguish." No wonder his passing away has evoked universal regret. The Tashkent Pact will be a monument to his noble thoughts and constant strivings in the cause of peace. The moment of his greatest personal triumph became, also the moment of a great tragedy for his people. As His Holiness the Shankaracharya of Kamakoti Pectam so aptly expressed it, Shri Lal Bahadur died as an "emancipated soul" and the whole country should feel proud to have had such a noble and worthy son. He has become verily a pattern and exemplar to his successors. May his soul rest in peace.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—K. SUBBA RAO, J.C. SHAH AND S.M. SIKRI, JJ.

T. S. Srinivasan

... Appellant^a

Commissioner of Income-tax, Madras

.. Respondent.

Income-tax Act (XI of 1922), section 3—Hindu Undivided family—Assessee, a divided member acquiring properties with the help of assets allotted, under the partition—Assessed in the status of an individual in prior years—Conception at the commencement of the account year and birth of a son before the end of account year—Emergence of a Hindu undivided family under the Hindu Law—Not applicable under the Act to affect assessment as an individual.

The assessee, a divided member of a joint family, with the assets allotted under the partition acquired house properties, shares and deposits and also drew salary from a limited company as its manager, was assessed in the status of an individual for the assessment year 1952-53. For the assessment year 1953-54 the assessee filed a return in the capacity of an individual. A son conceived at the commencement of the account year was born to the assessee at the end of the account year. For the assessment year 1953-54 the assessee claimed to be assessed in regard to the income from all the properties excepting his salary, in the status of a Hindu undivided family, on the basis of the birth of a son. The department, the Tribunal in appeal and the High Court in reference rejected the claim. On appeal to the Supreme Court.

Held, that the assessee is to be assessed in the status of an individual and not as a Hindu undivided family.

For the purposes of the Income-tax Act, the liability of a Hindu father to be assessed in the status of an individual will not be affected by the existence of a child in the womb at the commencement of the account year and birth at the end of the account year.

The doctrine that under the Hindu Law a son conceived or in the mother's womb is equal in many respects to a son actually in existence in the matter of inheritance, partition, survivorship and the right to impeach an alienation made by his father, is not of universal application and it applies mainly for the purpose of determining the rights to property and safeguarding such rights of the son. This doctrine does not fit in with the scheme of the Income-tax Act, as introducing uncertainties and anomalies in the working of the Act; it could not have been the intention of the Legislature to impose a liability on persons yet unborn.

The question that the child was in existence at the end of the accounting year and that the status would be that of Hindu undivided family, was not to be allowed to be raised for the first time. But even if a Hindu undivided family was in existence towards the end of the accounting year, till the whole income received or accrued in the accounting year did not thereby become the assessable income of the Hindu undivided family. Till the child was born the income which accrued to, or arose to, or was received by the assessee was his income. The Act disregards subsequent application of income and profits once they have arisen. When the income and profits arose, they belonged to the assessee as no Hindu undivided family was then in existence. This position cannot be displaced by the birth of the son, which brought into existence a Hindu undivided family.

Appeal from the Judgment of the Madras High Court dated 9th August, 1961, in Case Referred No. 86 of 1957.

A. V. Viswanatha Sastri, S. Swaminathan and R. Gopalakrishnan, for Appellant.

The Attorney-General (C. K. Daphtary), Gopal Singh and R. N. Sachthy, for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—This appeal, by certificate of the High Court of Madras, is directed against its judgment in a reference made to it under section 66 (1) of the Indian Income-tax Act, 1922, hereinafter referred to as the Act, by the Income-tax Appellate Tribunal, Madras. The question referred was :

“Whether the assessment of the income of the assessee, other than his salary, in the hands of the assessee as an individual and not as a Hindu undivided family till 11th December, 1952, for the assessment year 1953-54 is valid?”

The question arose out of the following facts. The appellant, hereinafter referred to as the assessee, is the youngest son of T. V. Sundaram Ayyangar, who was the karta of a Hindu Undivided family consisting of a number of persons. There was a partial partition of the above family and 150 shares of Rs. 1,000 each in T. V. Sundaram Iyengar and Sons, Limited, a private limited company, were divided equally among the coparceners, the assessee getting 25 shares of the value of Rs. 25,000. With the aforesaid shares as nucleus, the assessee acquired house-properties, shares and deposits upto 31st March, 1952. As the assessee was also the Service Manager of the aforesaid private limited company, he also received substantial remuneration.

The first son, named Venugopal, was born to the assessee on 11th December, 1952, and it is common ground that the conception of the child must have taken place sometime in March, 1952.

For the assessment year 1952-53, the assessee was assessed as an individual with reference to all his sources of income. For the assessment year 1953-54 accounting year 1st April, 1952 to 31st March, 1953 the assessee claimed that the income from all sources, except salary, should be assessed in the hands of a Hindu undivided family consisting of himself and his son Venugopal, which, according to him, had come into existence in or about March, 1952, when Venugopal was conceived.

The Income-tax Officer, while admitting that a male child acquires coparcenary rights in the family even from the date of his conception, considered that this proposition applied only as far as the minor's rights *inter se* other members were concerned, and as far as the claims of the State or outsiders were concerned, he thought that an unborn son would not come into the picture. Therefore, he recognised the family only from the date of the birth of the child, viz., 11th December, 1952. The Appellate Assistant Commissioner upheld his view, and the assessee also failed before the Appellate Tribunal. The High Court answered the question against the assessee. Mr. A. V. Viswanatha Sastri, the learned Counsel for the assessee, contends that under the Act, a Hindu undivided family is a separate unit, and in determining whether a Hindu undivided family exists or not, and if it exists, from what date it has come into being, regard must be had to the principles of Hindu Law, for the Act does not lay down any principles regarding this matter. He then urges that it is well-settled that according to Hindu Law, a son conceived has the same rights of property as a living son, and this rule, he says, is not a matter of fiction but a substantive rule of Hindu Law. He further, says that it is well-settled, according to Hindu Law, that a joint Hindu family comes into existence from the date a son is conceived, and, as in this case, the son was conceived in March, 1952, the Hindu undivided family was in existence from the beginning of the accounting year 1952-53.

The learned Attorney-General, who appears on behalf of the Revenue, does not dispute the existence of the doctrine of Hindu Law relied on by Mr. Sastri, but says that this doctrine applies only for a special purpose, the purpose being to safeguard the rights of the son to property, and that Hindu Law itself recognises that this doctrine is not of universal application. He urges, in the alternative, that, at any rate, the Act is concerned with realities; under the Act, the person to whom income accrues must be a visible reality, and, he says, the only visible person who existed upto 11th December, 1952, was the assessee. He further says that we would be introducing anomalies in the working of the Act if this fiction is applied to the instant case. In addition, he relies on the form of return of income-tax, which, he says, would be difficult to fill if the return is filed before the birth of the son.

In *G. B. C. Deshmukh v. I. Mallappa Chanbasappa*¹, this Court had occasion to consider the scope of the doctrine that under the Hindu Law a son conceived or in his mother's womb is equal in many respects to a son actually in existence in the matter of inheritance, partition, survivorship and the right to impeach an alienation made

by his father. But this Court refused to extend it to adoption. Subba Rao, J., speaking for the Court, observed :

“But there is an essential distinction between an alienation, partition and inheritance on the one hand and adoption on the other: his right to set aside an alienation hinges on his secular right to secure his share in the property belonging to the family, as he has a right by birth in the joint family property and transactions effected by the father in excess of his power when he was in the embryo are voidable at his instance; but, in the case of adoption, it secures mainly spiritual benefit to the father and the power to adopt is conferred on him to achieve that object. The doctrine evolved wholly for a secular purpose would be inappropriate to a case of adoption. We should be very reluctant to extend it to adoption, as it would lead to many anomalies and in some events defeat the object of the conferment of the power itself. The scope of the power must be reasonably construed so as to enable the donee of the power to discharge his religious duty. We, therefore, hold that the existence of a son in embryo does not invalidate an adoption”

The question that arises is whether this doctrine of Hindu Law can be applied for the purpose of determining the coming into being of a Hindu undivided family as an assessable entity. As this Court held in *G. B. C. Deshmukh v. I. Mallappa Chanbasappa*¹, the doctrine is not of universal application, and it applies mainly for the purpose of determining rights to property and safeguarding such rights of the son. It seems to us that this doctrine does not fit in with the scheme of the Act, and it could not have been the intention of the Legislature to have incorporated the special doctrine into the Act.

Section 3 of the Act charges the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually. Section 4 includes in the total income of any person all income, profits and gains, *inter alia*, if such person is resident, which accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year. Income can accrue or arise day-to-day or at the end of the year, and it would be surprising to say that for the purpose of the Act it is not known at a particular time to which entity income is accruing or arising. At the relevant time, under section 22 of the Act, the Income-tax Officer was required to give notice by publication in the press and by publication in the prescribed manner, requiring every person whose total income in the previous year exceeded the maximum amount which is not chargeable to income-tax, to furnish within such period, not being less than sixty days as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner, setting forth his total income and total world income during that year. Under sub-section (2), the Income-tax Officer could serve a notice upon a particular person requiring him to furnish within a period not less than 30 days a return in the prescribed form. The person had then to file a return. If the contention of Mr. Sastri is right, in many cases an assessee would not have been able to file a return. Suppose the wife of an assessee conceived in February, 1954, and his accounting year was the year ending 31st March, 1954. By June/July, 1954, the assessee would not know whether he should file the return as an individual or as Hindu undivided family, because he would not know whether the child was going to be a son or a daughter. However, if a conditional return was filed, the Income-tax Officer would have to hold his hands and not assess till the child was delivered.

Part III-A of the prescribed form required the following particulars to be filled up in the case of a Hindu undivided family :

Serial No	Names of members of the family at the end of the previous year who were entitled to claim partition	Relationship	Age at the end of the previous year.	Remarks
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This form clearly proceeds on the basis that all members were in existence at the end of the previous year. Has a son in the womb at the end of the previous year and born in the assessment year any age at the end of the previous year? Would

it have a name at the end of the previous year? We find it extremely difficult to reconcile this doctrine of Hindu Law with the aforesaid provisions of the Act. We would not be justified in introducing uncertainties and anomalies in the working of the Act by introducing this doctrine for the purpose of section 3 of the Act.

Apart from the difficulty of reconciling this doctrine with the scheme of the Act, Mr. Sastri has not been able to satisfy us that any rights of the son are being affected by not recognising his existence for the purposes of section 3 of the Act till he is actually born. Income-tax is a liability and it could not have been the intention of the legislature to impose a liability on persons yet unborn.

Mr. Sastri contends, in the alternative, that what we are concerned with is the status at the end of the accounting year and that at least in this case where the child was in existence at the end of the accounting year, the status would be that of Hindu undivided family. This point was not raised before, and the learned Attorney-General rightly objected to it being raised at this stage. But even if a Hindu undivided family was in existence towards the end of the accounting year, still the whole income received or accrued in the accounting year did not thereby become the assessable income of the Hindu undivided family. Till the child was born, the income which accrued to, or arose to, or was received by, the assessee was his income. The Act disregards subsequent application of income and profits once they have arisen. When the income and profits arose, they belonged to the assessee, as no Hindu undivided family was then in existence. This position cannot be displaced by the birth of the son, which brought into existence a Hindu undivided family.

In the result, we agree with the High Court that the answer to the question must be in favour of the revenue. The appeal fails and is dismissed with costs.

T.K.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—K. SUBBA RAO, J.C. SHAH AND S.M. SIKRI, JJ.

India Cements Ltd., Madras

*.. Appellant**

v.

Commissioner of Income-tax, Madras

.. Respondent.

Income-tax Act, 1922 (XI of 1922), sections 10 (2) (xv) and 65 (1) and 2—Business Expenditure—Borrowing—Security of fixed assets—Stamps, registration fees and law charges—Whether capital or revenue expenditure—Purpose of loan and manner of utilization, whether relevant—Entirely benefit—Borrowing utilized for capital assets—Loan itself, whether enduring asset or mere liability.

Practice—High Court—Case stated—Tribunal's findings of fact—Unchallengeable, save where specific question is raised in reference.

A company borrowed Rs. 40 lakhs on the security of its fixed assets and, in that connection, it had to incur an expenditure of Rs. 8½,633 for stamps, registration fees and law charges. In its relevant assessment to income-tax, the company claimed the amount as an allowance under section 10 (2) (xv) of the Income-tax Act, 1922. The Officer disallowed the claim on the score that the expenditure was capital. The Officer's finding was that the proceeds of the borrowing was utilized by the company to discharge a prior loan which itself was utilized on the company's capital assets. On appeal, the Tribunal found as a fact that the whole of the loan of Rs. 40 lakhs was purely for purposes of augmenting the company's working funds and not for capital purposes. On this finding, the Tribunal allowed the company's claim. The Department demanded a case and, on reference, the High Court, relying on the Income-tax Officer's findings rather than on those of the Tribunal, held that the expenditure was capital. On appeal, by Special Leave, at the instance of the company,

Held, that the expenditure was not in the nature of capital expenditure and was laid out or expended wholly and exclusively for the purposes of the assessee's business.

Held, further that the expenditure, in the circumstances of the case, is revenue expenditure under section 10 (2) (v) of the Act, because (a) the loan obtained is not an asset or advantage of an enduring nature, (b) the expenditure was made for securing the use of money for a certain period and (c) it is irrelevant to consider the object with which the loan was obtained.

A loan is a liability and has to be repaid and it is erroneous to consider a liability as an asset or advantage for the enduring benefit of the business.

There can be no distinction, in principle, between interest in respect of a loan and an expenditure incurred for obtaining the loan. The further distinction between the borrowing of capital and securing merely temporary or day-to-day accommodation or banking or trading facilities is not valid under the Indian Income-tax Act.

The principle that the nature of the expenditure incurred in raising a loan would depend on the nature and purpose of the loan cannot be agreed to. The purpose for which a loan was required is irrelevant to the consideration of the question whether the expenditure for obtaining the loan was revenue expenditure or capital expenditure.

Also held, that in a reference the High Court must accept the findings of fact made by the Appellate Tribunal and it is for the person who has applied for a reference to challenge those findings, first by an application under section 66 (1) of the Income-tax Act. If he has failed to file an application under section 66 (1) expressly raising the question about the validity of the findings of fact, he is not entitled to urge before the High Court that the findings are vitiated for one reason or another.

Appeal by Special Leave from the judgment of the Madras High Court in Tax Case No. 67 of 1958, dated 31st October 1961.

A.V. Viswanatha Sastri, Senior Advocate and *R. Gopalakrishnan*, for Appellant.

S. T. Desai, Senior Advocate (*Gopal Singh* and *R. N. Sachthey* with him), for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—This appeal by Special Leave is directed against the judgment of the High Court of Judicature at Madras answering the following question of law in favour of the respondent :

“Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the sum of Rs 84,633 expended by the assessee in obtaining the loan or any part thereof is an allowable expenditure.”

The facts and circumstances of the case as stated by the Tribunal in the statement of the case are as follows : The appellant, India Cements Limited, Madras, hereinafter referred to as the assessee, is a public limited company. The question arises in respect of the assessment year 1950-51, accounting period 1st April, 1949 to 31st March, 1950. During the accounting year it obtained a loan of 40 lakhs of rupees from the Industrial Finance Corporation of India Ltd. This loan was secured by a charge on the fixed assets of the company. Since Mr. S.T. Desai, the learned Counsel for the respondent, has disputed some facts as stated by the Appellate Tribunal, it would be convenient to give these facts in the words of the Appellate Tribunal. It is stated in the statement of the case that :

“the proceeds of this loan was utilised to pay off a prior debt of Rs. 25 lakhs due to M/s. A. F. Harvey Limited and Madurai Mills, Limited. It cannot be stated definitely how the balance of Rs 50 lakhs was used, but the directors, while reporting on the accounts for the year ended 31st March, 1949 on 4th October, 1949 stated that that was utilised towards working funds.”

The expenditure of Rs. 84,633 in connection with this loan was made up of the following items :

	Rs.
Stamps	60,023 00
Registration fee	16,067 00
Charges for certified copy of the mortgage deed	28 00
Indemnity deed by Essen & Company, Limited	15 00
Vakil's fee for drafting deed	7,500 00
Legal fees	1,000 00
Total	84,633 00

The assessee did not charge this expenditure in the profits and loss account for that year. It was shown in the balance-sheet as mortgage loan expenses. It continued to be so shown till 31st March, 1952. In the accounts for 31st March, 1953, this was written off by appropriation against the profits of that year.

The Income-tax Officer refused to allow the deduction of Rs. 84,633. He observed :

"As per the information furnished by the auditors, Rs. 25 lakhs of the loan was to be paid to M/s. A.F. Harvey, Limited and Madurai Mills, Limited in discharge of the amount borrowed from them and utilised on the capital assets of the company.

Though in the Company's books the amount of Rs. 84,633 was not charged to revenue, but capitalised and carried forward in the balance-sheet, for purposes of income-tax, the Company's auditors claim the same as an admissible item of revenue expenditure."

He held that the expenditure was incurred in obtaining capital and should be distinguished from interest on borrowed capital which was alone admissible as a deduction under section 10 (2) (iii). According to him, section 10 (2) (xv) specifically excludes from consideration any item of capital expenditure. He further held that the case was not distinguishable from the decision in *The Nagpur Electric Light and Power Co. v. Commissioner of Income-tax, Central Provinces*¹. The Appellate Assistant Commissioner agreed with the Income-tax Officer. The Appellate Tribunal distinguished the case of *The Nagpur Electric Light and Power Co. v. Commissioner of Income-tax*¹ on the ground that in *The Nagpur Electric Light case*¹ money was expended for obtaining capital. It observed as follows:—

"Here we find the position to be different. A study of the balance-sheet of the Company as at 31st March, 1949 discloses the fact that the paid-up capital was sufficient to cover the entire capital outlay of the company and that the further borrowing of Rs. 25 lakhs was for augmenting the working funds of the company. It appears to us that even at that early stage the money was borrowed and used not, for capital purposes, but for augmenting the working funds of the company. We, therefore, consider that the whole of the mortgage loan was used, firstly, to discharge the loan of Rs. 25 lakhs, and the balance for working funds and, as such, the whole of the amount was purely for the purposes of augmenting the working capital of the company and that it could not be stated that it was used for capital purposes. In this view of the matter, we hold that the money expended in obtaining the loan is an allowable expenditure."

The High Court, after noticing the findings of the Income-tax Officer and the Tribunal, preferred the findings of fact made by the Income-tax Officer. It observed :

"At this stage, we may point out that the conclusion reached by the Tribunal that the money was borrowed only for working expenses and not for capital investment proceeded on an inference based upon the balance-sheet. The Tribunal did not investigate how the sum of Rs. 25 lakhs earlier borrowed from A. H. Harvey and Madurai Mills, Ltd. was actually utilised. Though in the order of the Income-tax Officer, it is found stated, that that amount was utilised on the capital assets of the company and that statement was based on the authority of the information furnished by the auditors of the assessee, the Tribunal either overlooked or ignored this circumstance. In the face of the statement so recorded by the Income-tax Officer, the Tribunal does not appear to have been justified in relying upon inferences in ascertaining whether the earlier borrowing was on capital or revenue account."

The High Court after reviewing various cases, observed :

"If we ask for what purpose the expenditure in the present case was incurred, the only answer must be that it was incurred for the purpose of bringing into existence an asset in the shape of borrowing these Rs. 40 lakhs. The further question would then be whether this asset or advantage was not for the enduring benefit of the business and whether the expenditure incurred was one which was incurred once and for all. The answer to both questions would again be in the affirmative. It is true that the borrowed money has to be repaid and it cannot be an enduring advantage in the sense that the money becomes part of the assets of the company for all time to come. But, it certainly is an advantage which the company derives for the duration of the loan and undoubtedly it could not have been for any purpose other than an advantage to the business. That the borrowing was made, that it is not enduring in the sense that the borrowing has to be repaid after a short or long period, as it were, cannot affect the conclusion that it was nevertheless an asset or an advantage that was secured. Viewed in the light of the tests adumbrated in the above decision (*Assam Bengal Cement Co., Ltd. v. Commissioner of Income-tax*)² it seems to us that the expenditure must be regarded as capital expenditure. As the facts of the case which we have set out earlier indicate, there can be no doubt that at least to the extent of Rs. 25 lakhs that amount was expended for purposes of a capital nature, clearly in order to bring into existence capital assets. We have also pointed out that

1. (1931) 6 I.T.C. 28

2. (1955) S.C.J. 205 (1955) 1 M.L.J. (S.C.)

118 : (1955) 1 S.C.R. 972 (1955) 27 J.T.R. 34:

A.I.R. 1955 S.C. 89.

though it was vaguely stated by the Tribunal that the other sum of Rs. 15 lakhs was utilised as working funds there seems to be no material whatsoever before the Tribunal to justify its coming to that conclusion."

The learned Counsel for the assessee-company, Mr. A. V. Viswanatha Sastri, urges that the expenditure is admissible as a deduction under section 10 (2) (xv) of the Act. He says that the High Court erred in holding that the expenditure was made to acquire any asset or advantage of an enduring nature within the test laid down by Viscount Cave and approved by this Court in *Assam Bengal Cement Co., Ltd. v. Commissioner of Income-tax*¹. He further says that what was secured by the expenditure was a loan and in India money expended in raising a loan, whether by means of a debenture or a mortgage and whether you call it a loan capital or not, is not an expenditure in the nature of capital expenditure. He further submits that the expenditure was expended wholly and exclusively for the purpose of the business of the company.

The learned Counsel for the Revenue, Mr. S. T. Desai, supports the reasoning of the High Court. He says that the High Court was right in preferring the findings of the Income-tax Officer on the ground that there was no material for the finding made by the Appellate Tribunal and the finding was based on surmises and material evidence was ignored. He says that the High Court in a reference is entitled to ignore any findings of fact made by the Appellate Tribunal, if those findings are vitiated. In the alternative, he says that the question referred is wide enough to include the question whether there are any material for the finding of the Appellate Tribunal. On the merits he contends that the expenditure takes the colour from the thing on which the expenditure is made. If the money is spent to obtain capital, then the expenditure assumes the nature of capital expenditure, but if the money is spent to obtain raw materials then the expenditure takes the colour of revenue expenditure. He further says that the borrowed money is an enduring asset; and any expenditure made to obtain this money falls within the test laid down by Viscount Cave and approved by this Court.

A number of cases have been referred to during the hearing of the case by both the Counsel, but we do not propose to refer to all of them. We must start first with the cases decided by this Court and see what principles have been laid down for distinguishing revenue expenditure, from expenditure in the nature of capital expenditure, and especially those cases which dealt with similar problems. We shall first consider *State of Madras v. G. J. Coelho*². This was not a case arising under the Indian Income-tax Act but under the Madras Plantations Agricultural Income-tax Act, 1955, in which a section exactly similar to section 10 (2) (xv) existed. In brief, the facts in that case were that the assessee had borrowed money for the purpose of purchasing the plantations and he claimed that in computing his agricultural income from these plantations the entire interest paid by him on moneys borrowed for the purpose of purchasing the plantation should be deducted as expenditure, under section 5 (e) of the Act. In the Madras Act there was no provision similar to section 10 (2) (iii) of the Act and thus interest was not expressly deductible as an allowance. This Court applied the test formulated by Viscount Cave, L. C., in *Atherton v. British Insulated and Helsby Cables Ltd.*³ and approved by this Court in *Assam Bengal Cement Co. Ltd. v. Commissioner of Income-tax*¹, and held that the payment of interest was a revenue expenditure. It observed that :

"no new asset is acquired with it; no enduring benefit is obtained. Expenditure incurred was part of the circulating or floating capital of the assessee. In ordinary commercial practice payment of interest would not be termed as capital expenditure."

This Court further held that the expenditure was for the purpose of business.

Mr. Desai tried to distinguish that case on the ground that what was at issue was interest on loan and not expenditure incurred for obtaining the loan. In our

¹ 1. (1955) S.C.J. 205; (1955) 1 M.L.J. (S.C.) 118; (1955) 1 S.C.R. 972; (1955) 27 I.T.R. 34; A.I.R. 1955 S.C. 89.

2. (1964) 2 S.C.J. 400; (1964) 2 I.T.J. 215; (1964) 53 I.T.R. 186; A.I.R. 1965 S.C. 321.

3. (1925) 10 T.C. 155.

opinion, there is no justification for drawing this distinction in India. As observed by Lord Atkinson in *Scottish North American Trust v. Farmer*¹:

"the interest is, in truth, money paid for the use or hire of an instrument of their trade as much as is the rent paid for their office or the hire paid for a typewriting machine. It is an outgoing by means of which the Company procures the use of the thing by which it makes a profit, and like any similar outgoing should be deducted from the receipts, to ascertain the taxable profits and gains which the Company earns. Were it otherwise, they might be taxed on assumed profits when, in fact, they made a loss".

It will be remembered that there was no section like section 10 (2) (iii) of the Act in the English Income-tax Act. On the other hand, there were certain rules prohibiting the deduction in respect of

"any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, . . . or any interest which might have been made if any such sums as aforesaid had been laid out as interest."

Lord Atkinson first held in that case that the express prohibitions did not apply to the facts of the case and then proceeded to discuss general principles. These observations show that where there is no express prohibition, an outgoing, by means of which an assessee procures the use of a thing by which it makes a profit, is deductible from the receipts of the business to ascertain taxable income. On the facts of this case, the money secured by the loan was the thing for the use of which this expenditure was made. In principle, apart from any statutory provisions, we see no distinction between interest in respect of a loan and an expenditure incurred for obtaining the loan.

Mr. Desai urges that these observations of Lord Atkinson should be limited to a case where temporary borrowings are made. It is true that the House of Lords was dealing with the case of a company and the moneys that were borrowed were of a temporary character. But this fact was only relied on to hold that the moneys secured were not "capital" within rule 3 of First Case, section 100 (5 and 6 Vic. Ch. 35) of the Income Tax Act, 1842, for Lord Atkinson observed at p. 706 :

" it appears to me, simply, it amounts to this that the word 'capital', must, in this rule, be held to bear a wholly artificial meaning differing altogether from the ordinary signification, though there be no context in the clause requiring that there should be given to it a meaning different from that which it bears in ordinary commercial transactions."

He then referred to the decision in *Bryon v. The Metropolitan Saloon Omnibus Company*², to show that the borrowing by a joint stock company of money by the issue of debentures does not amount to an increasing of the capital of the company.

In *Bombay Steam Navigation Co. Ltd. v. Commissioner of Income-tax*³, this Court again examined the question of distinguishing between capital expenditure and revenue expenditure. This Court first held that on the facts of the case, clause (iii) of section 10 (2) did not apply, because the assessee in that case had agreed to pay the balance of consideration due by the purchaser and this did not, in truth, give rise to a loan. Then Shah, J., observed :

"Whether a particular expenditure is revenue expenditure incurred for the purpose of business must be determined on a consideration of all the facts and circumstances, and by the application of principles of commercial trading. The question must be viewed in the larger context of business necessity or expediency. If the outgoing or expenditure is so related to the carrying on or conduct of the business, that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure."

We will now briefly deal with relevant decisions of the High Courts. The first case referred is *In re Tata Iron and Steel Company Ltd.*⁴. In that case, the Tata Iron and Steel Co. Ltd., had incurred an expenditure of Rs. 28 lakhs as underwriting commission paid to underwriters on an issue of 7 lakhs preference shares of Rs. 100

1. (1911) 5 T.C. 693 at 707.

2. 3 D.G. & J. 123.

3. (1965) 1 S.C.J. 719 : (1965) 1 I.T.J. 60 : (1965) 56 I.T.R. 52 : A.I.R. 1965 S.C. 1201.

4. (1921) I.L.R. 45 Bom. 1306 : 23 Bom. L.R. 576 : 1 I.T.C. 125 : A.I.R. 1921 Bom. 391.

each, and the Company claimed to deduct this amount as expenses under section 9 (2) (ix) of the Indian Income-tax Act (VII of 1918). Macleod, C. J., observed :—

“ If it is admitted that the cost of raising the original capital cannot be deducted from profit after the first year, it is difficult to see how the cost of raising additional capital can be treated in a different way. Expenses incurred in raising capital are expenses of exactly the same character whether the capital is raised at the flotation of the company or thereafter: *The Texas Land and Mortgage Company v. William Holtham*¹.”

He further observed that :

“ as long as the law allows preliminary expenses and goodwill to be treated as assets, although of an intangible nature, the money so spent is in the nature of capital expenditure just as much as money spent in the purchase of land and machinery.”

The Chief Justice accordingly held that Rs. 28 lakhs could not be treated as expenditure (not in the nature of capital expenditure) solely incurred for the purpose of earning the profits of the company's business. Shah, J. also came to the same conclusion and he thought that the *ratio decidendi* in *Texas Land and Mortgage Company v. William Holtham*¹, and the principles underlying the decision in *Royal Insurance Company v. Watson*², lent support to this conclusion.

At this stage it would be convenient to consider the case of *Texas Land and Mortgage Company v. William Holtham*¹, relied on in this decision. We have already mentioned that the statute law in England is different from the law in India and the observations of the learned Judges in the English cases must be appreciated in the light of the background of the English Income Tax Act. In this case, a mortgage company had raised money by the issue of debentures and debenture stock, and incurred expenses for the issue of mortgage and placing of such debentures and debenture stock. The Company claimed to deduct these expenses but the High Court held that the expenses could not be deducted under Schedule D of the English Income Tax Act as trading expenses. Mathew, J., gave the following reasons for disallowing the claim :

“ The amount paid in order to raise the money on debentures, comes off the amount advanced upon the debentures, and, therefore, is so much paid for the cost of getting it, but there cannot be one law for a company having sufficient money to carry on all its operations and another which is content to pay for the accommodation. This appears to me to be entirely concluded by the decision of yesterday. (*Anglo-Continental Guano Works v. Bell*³).”

In the course of argument, Cave, J., had remarked :

“ It is only so much capital. A man wants to raise £100,000 of capital, and in order to do that he has to pay £4,000. That makes the capital £96,000. That is all.”

In reply to the argument of Finlay, Q. C. that “ the capital of the company properly so-called, is the share capital.” Cave J., remarked :

“ To the extent that you borrow you increase the capital of the company.”

In our opinion, if one keeps in mind the background of the English Income Tax Act, the observations reproduced above have no relevance to cases arising under the Indian Income-tax Act. In face of rule 3, Case 1, section 100 (5 & 6 Vict. Ch. 35) prohibiting the deduction of any expenditure in respect of any sum employed or intended to be employed as capital, Mathew and Cave, JJ., were only concerned with the question whether the amount secured by debentures and the amount obtained by the issue of debentures and debenture stock could be called capital employed or intended to be employed within the meaning of this rule. Rightly or wrongly, the English Courts have held that the amount obtained by the issue of debentures is capital employed within the meaning of the rule, but this does not give us any guidance in interpreting the words “ capital expenditure ” occurring in section 10 (2) (xv) of the Act. In our opinion, the Bombay High Court was wrong in relying on *Texas Land and Mortgage Company v. William Holtham*¹. But we do not say that the *Tata Iron and Steel Co*⁴. case was wrongly decided. Obtaining capital by issue of shares is different from obtaining loan by debentures.

1. (1894) 3 T.C. 255.

2. (1897) A.C. 1.

3. (1894) 3 T.C. 239.

4. (1921) 1 I.T.C. 125; I.L.R. (1921) 45 Bom. 1306; 23 Bom. L.R. 576; A.I.R. 1921 Bom. 391.

In *Nagpur Electric and Light Co. v. Commissioner of Income-tax*¹, the Court of the Judicial Commissioner, Nagpur, held that expenses for raising debenture loan required for changing the system of supplying current from D. C. to A. C. and for discharging a prior loan was not allowable as deduction of the company's assessable income. The Judicial Commissioner followed the case of *Texas Land and Mortgage Company v. William Holtham*², and *In re Tata Iron and Steel Company Ltd.*³ After referring to these two cases, the only additional reason given was that:

"apart from authority it seems to us to stand to reason that money expended in obtaining capital must be treated as capital expenditure"

With great respect, we must hold that this case was wrongly decided.

The Kerala High Court in *Western India Plywood Ltd. v. Commissioner of Income-tax, Madras*⁴, held that the expenditure incurred by the company to raise a loan by debenture was a capital expenditure and was therefore not deductible under section 10 (2) (xv). The High Court relying on *European Investment Trust Company v. Jackson*⁵ and *Ascot Gas Water Heaters v. Duff*⁶, and some other cases drew a distinction between the borrowing of capital and securing merely temporary or day-to-day accommodation or banking or trading facilities. According to the High Court, the expenses for borrowing capital could not be treated as revenue expenditure. This distinction may be valid in English Law but we are unable to appreciate how the distinction is valid under the Indian Income-tax Act. As the decision is mainly based on this distinction and relies *inter alia* on *In re Tata Iron and Steel Co. Ltd.*³, and *Nagpur Electric and Light Co. v. Commissioner of Income-tax*⁷, we must with respect hold that the case was wrongly decided.

In *Vizagapatnam Sugars and Refinery Ltd v. Commissioner of Income-tax*⁸ the Andhra Pradesh High Court relying on *Texas Land and Mortgage Company v. William Holtham*², and the decision in *Western India Plywood Ltd. v. Commissioner of Income-tax, Madras*⁴, held that on the facts and circumstances of that case, brokerage and commission of four annas on every maund of sugar paid by the assessee-company was not revenue expenditure but capital expenditure. In our opinion, the decision, as far as the brokerage was concerned, was wrong, but we do not say anything in this case with respect to the decision as far as the commission on sale of goods was concerned.

The Calcutta High Court examined the question in great detail in *Sri Annapurna Cotton Mills Ltd. v. Commissioner of Income-tax*⁹. Bachawat, J., held that the loan of Rs. 10 lakhs obtained by the company was an asset or advantage for the enduring benefit of the business of the assessee. He placed reliance on a number of cases, some of which we have already considered. But we are unable to agree that a loan obtained can be treated as an asset or advantage for the enduring benefit of the business of the assessee. A loan is a liability and has to be repaid and, in our opinion, it is erroneous to consider a liability as an asset or an advantage within the test laid down by Viscount Cave and approved and applied by this Court in many cases. Sinha, J., after referring to a number of cases, felt that the raising of capital by issue of debentures was a recognised mode of raising capital and he felt that the decided cases had laid down the proposition that borrowing money by the issue of debentures was an acquisition of capital asset and that any commission or expenditure incurred in respect thereof was of a capital nature and not to be considered as in the nature of revenue. He was impressed by the fact that not a single case to the contrary was brought to his notice. But we have to decide the case on principle, and, with respect, it seems to us that he erred in treating the loan as equivalent to capital for the purpose of section 10 (2) (xv) of the Act.

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| 1. (1931) 6 I.T.C. 28. | 452. (1960) Ker. L.J. 230. A.I.R. 1950 Ker 253. |
| 2. (1894) 3 T.C. 255. | 5. (1932) 18 T.C. 1. |
| 3. (1921) 1 I.T.C. 125. I.L.R. (1921) 45 : | 6. (1942) 24 T.C. 171. |
| Bom 1306. 23 Bom L.R. 576. A.S.R. 1921 | 7. (1931) 6 I.T.C. 28 |
| Bom 391. | 8. (1963) 47 I.T.R. 139 |
| 4. (1960) 38 I.T.R. 533. I.L.R. (1960) Ker. | 9. (1964) 54 I.T.R. 592. |

In *S. F. Engineer v. Commissioner of Income-tax*¹, the Bombay High Court held that the expenditure incurred for raising loan for the carrying on of a business cannot in all cases be regarded as an expenditure of a capital nature. On the facts of the case, they held that as construction and sale of the building was the sole business of the firm and the building was its stock-in-trade, and the loan was raised and used wholly for the purpose of acquiring this stock-in-trade and not for obtaining any fixed assets or raising any initial capital or for expansion of the assessee's business, the expenditure incurred for the raising of loan was not an expenditure of capital nature, but revenue expenditure. Although the conclusion of the High Court was correct, we are not able to agree with the principle that the nature of the expenditure incurred in raising loan would depend upon the nature and purpose of the loan. A loan may be intended to be used for the purchase of raw material when it is negotiated, but the company may, after raising the loan, change its mind and spend it on securing capital assets. Is the purpose at the time the loan is negotiated to be taken into consideration or the purpose for which it is actually used? Further, suppose that in the accounting year the purpose is to borrow and buy raw material but in the assessment year the company finds it unnecessary to buy raw material and spends it on capital assets. Will the Income-tax Officer decide the case with reference to what happened in the accounting year or what happened in the assessment year? In our opinion, it was rightly held by the Nagpur Judicial Commissioner in *Nagpur Electric Light and Power Co. v. Commissioner of Income-tax*², that the purpose for which the new loan was required was irrelevant to the consideration of the question whether the expenditure for obtaining the loan was revenue expenditure or capital expenditure.

To summarise this part of the case, we are of the opinion that (a) the loan obtained is not an asset or advantage of an enduring nature; (b) that the expenditure was made for securing the use of money for a certain period; and (c) that it is irrelevant to consider the object with which the loan was obtained. Consequently, in the circumstances of the case, the expenditure was revenue expenditure within section 10 (2) (xv).

The last contention of Mr. Desai is that even if it is revenue expenditure, it was not laid out wholly and exclusively for the purpose of business. Subba Rao, J., reviewed the case law in *Commissioner of Income-tax v. Malayalam Plantations*³ and observed as follows:

"The expression 'for the purpose of the business' is wider in scope than the expression 'for the purpose of earning profits'. Its range is wide; it may take in not only the day-to-day running of a business, but also the rationalisation of its administration and modernization of its machinery; it may include measures for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile title; it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business; it may comprehend many other acts incidental to the carrying on of a business"

Mr. Desai says that the act of borrowing money in this case was not incidental to the carrying on of a business. We are unable to accept this contention.

In *Eastern Investments Ltd. v. Commissioner of Income-tax*⁴, this Court held that the Eastern Investments Ltd., an investment company, when it borrowed money on debentures, the interest paid by it was incurred solely for the purpose of making or earning such income, profits or gains within the purview of section 12 (2) of the Indian Income-tax Act. It held on a review of the facts that the transaction was voluntarily entered into in order indirectly to facilitate the running of the business of the company and was made on the ground of commercial expediency. This case, in our opinion, directly covers the present case, although Mr. Desai suggests that the case of an investment company stands on a different footing from the case of a manufacturing company. In some respects, their position may be different but in determining the question whether raising money is incidental to a business or

1. (1965) 11 T.J. 773 : (1965) 57 I.T.R. 455. 1722.

2. (1931) 6 I.T.C. 28.

3. (1964) 2 S.C.J. 338 : (1964) 2 I.T.J. 130. (1951) S.C.J. 420 : (1951) 20 I.T.R. 1 : (1951) S.C.R. 594 : A.I.R. 1951 S.C. 278.

4. (1964) 53 I.T.R. 140 (S.C.) : A.I.R. 1964 S.C.

not. we cannot discern any difference between an investment company and a manufacturing company. We may mention that in that case this Court was not considering whether the expenditure was in the nature of a capital expenditure or not, because it was agreed all through that the expenditure was not in the nature of capital expenditure, and the only question which this Court dealt with was whether the expenditure was incurred solely for the purpose of making or earning income, profits or gains.

The case of *Dharmavir Dhir v. Commissioner of Income-tax*¹, also supports the conclusion we have arrived at on this part of the case. It was held in that case that the payment of interest and a sum equivalent to 11/16th of the profits of the business of the assessee in pursuance of an agreement for obtaining loan from the lender were in a commercial sense expenditure wholly and exclusively laid out for the purpose of the assessee's business and they were, therefore, deductible revenue expenditure.

Before we conclude we must deal with the point raised by Mr. Sastri that the High Court erred in law in preferring the findings of the Income-tax Officer to that of the Appellate Tribunal. It is not necessary to decide this question, but it seems to us that in a reference the High Court must accept the findings of fact made by the Appellate Tribunal, and it is for the person who has applied for a reference to challenge those findings first by an application under section 66 (1). If he has failed to file an application under section 66 (1) expressly raising the question about the validity of the findings of fact, he is not entitled to urge before the High Court that the findings are vitiated for one reason or the other.

To conclude, we hold that the expenditure of Rs. 84,633 was not in the nature of capital expenditure and was laid out or expended wholly and exclusively for the purpose of the assessee's business. The answer to the question referred, therefore, must be in the affirmative. The appeal is allowed, the judgment of the High Court set aside and the question referred answered in the affirmative. The appellant will have its costs incurred here and in the High Court.

V.B.

Appeal allowed.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction.)

PRESENT:—K. N. WANCHOO. M. Hidayatullah, J. C. SHAH AND S. M. SIKRI, JJ.

Raja Soap Factory and others

.. Appellants*

v.

S. P. Shantharaj and others

.. Respondents.

Mysore Act (XIV of 1962), section 14—Mysore High Court—Jurisdiction to entertain a passing off action under the Trade and Merchandise Marks Act XLIII of 1958—Not invested with the original jurisdiction by statute or constitution.

Civil Procedure Code (V of 1908), sections 24 (1) (b) (i) and 151—Power to try and dispose of a proceeding after transfer from a Court lawfully seized of—No power involved to entertain a proceeding not otherwise within the cognizance of the High Court—Exercise of inherent powers if there is a proceeding lawfully before Court—High Court not to invest itself with jurisdiction not conferred by law.

The High Court of Mysore has not been invested by any statute or under its constitution with the power to exercise original jurisdiction under section 105 of the Trade and Merchandise Marks Act XLIII of 1958 and hence incompetent to entertain a passing off action.

The High Court of Mysore is by its constitution primarily a Court exercising Appellate Jurisdiction; it is competent to exercise original jurisdiction only in those matters in respect of which by special Acts it has been specifically invested with jurisdiction.

1. (1961) 42 I.T.R. 7 : (1961) 3 S.C.R. 359 : (1962) 2 S.C.J. 412 : A.I.R. 1961 S.C. 668.

* C.A. No. 771 of 1964.

20th January, 1965.

Mysore Act V of 1962 governing the exercise of jurisdiction by the High Court of Mysore is purely regulatory Act enacted for regulating the business and exercise of the powers of the High Court in relation to the administration of justice; it does not purport to confer upon the High Court any jurisdiction original or appellate. Section 14 of the Mysore Act V of 1962 also has repealed section 12 of the Mysore Act I of 1884 that authorised investing the High Court with the ordinary civil jurisdiction of a District Court in all suits of a civil nature.

Jurisdiction of a Court means the extent of the authority of a Court to administer justice prescribed with reference to the subject-matter, pecuniary value and local limits. As a Court of Appeal undoubtedly stands at the apex within the State, but on that account it does not stand invested with original jurisdiction in matters not expressly declared within its cognizance.

Jurisdiction to try a suit appeal or proceeding by a High Court under the power reserved by section 24 (1) (b) (i) of the Civil Procedure Code, arises only if the suit, appeal or proceeding is properly instituted in a Court subordinate to the High Court and the suit, appeal is in exercise of the power of the High Court transferred to it. Exercise of this jurisdiction is conditioned by the lawful institution of the proceeding in a subordinate Court of competent jurisdiction, and transfer hereof to the High Court. Power to try and dispose of a proceeding after transfer from a Court lawfully seized of it does not involve a power to entertain a proceeding which is not otherwise within the cognizance of the High Court.

The inherent power under section 151 of the Code may be exercised where there is a proceeding lawfully before the High Court; it does not however authorise the High Court to invest itself with jurisdiction where it is not conferred by law.

Appeal by Special Leave from the Judgment and Order, dated the 29th May, 1964 of the Mysore High Court in Civil Petition No. 90 of 1964.

S. S. Khanduja and Ganpat Rai, Advocates, for Appellants.

B. R. L. Iyengar, S. K. Mehta and K. L. Mehta, Advocates, for Respondents
Nos. 1 to 7.

The Judgment of the Court was delivered by

Shah, J.—On 5th May, 1964 the respondents—hereinafter called ‘the plaintiffs’—instituted in the High Court of Mysore an action in the nature of a passing off action against the appellants—hereinafter called ‘the defendants’—for a declaration that they “are exclusive owners of the trade mark consisting of the letters R.S.F. and No. 806”, for a permanent injunction restraining the defendants from passing off their washing soap as the goods of the plaintiffs and for incidental reliefs.

By section 105 of the Trade and Merchandise Marks Act (XLIII of 1958) a passing off action whether the trade mark is registered or unregistered may be instituted in any Court not inferior to a District Court having jurisdiction to try the suit. It appears that on 5th May, 1964 the District Court of Mysore, within the territorial limits of which the cause of action was alleged to have arisen, was closed for the summer vacation, and it is common ground that on that day there was no Judge functioning in the District Court who was on duty and competent to exercise the powers of the District Court. At the request of the plaintiffs the High Court entertained the plaint and also an application for interim injunction restraining “the defendants, their agents or servants from using the trade mark R.S.F. on washing soap manufactured by them and from selling washing soap bearing the said offending mark pending disposal of the case”. By order dated 29th May, 1964 the High Court granted the temporary injunction in terms of the prayer in the application.

In this appeal with Special Leave, Counsel for the defendants argues that the High Court had no jurisdiction to entertain the action instituted by the plaintiffs and had no power to make an order issuing a temporary injunction. The action, as framed, could properly be instituted in the District Court. The expression “District Court” has by virtue of section 2(e) of Act (XLIII of 1958) the meaning assigned to that expression in the Code of Civil Procedure, 1908. Section 2 (4) of the Code defines a “district” as meaning the local limits of the jurisdiction of a principal civil Court—called the District Court—and includes the local limits of the Ordinary Original Civil Jurisdiction of a High Court. If therefore a High Court is possessed of ordinary original

civil jurisdiction, it would, when exercising that jurisdiction be included, for the purpose of Act (XLIII of 1958), in the expression "District Court".

Exercise of jurisdiction by the High Court of Mysore is governed by Mysore Act (V of 1962). The Act is purely a regulatory Act enacted for regulating the business and exercise of the powers of the High Court in relation to the administration of justice; it does not purport to confer upon the High Court any jurisdiction original or appellate. It is true that by section 12 of the Mysore High Court Act (I of 1884) enacted by the Maharaja of Mysore to amend the Constitution of the High Court of Mysore, and to provide for the administration of justice by that Court, the Government of Mysore was authorised by notification to invest the High Court with Ordinary Original Civil Jurisdiction of a District Court in all suits of a civil nature exercisable within such local limits as the Government may from time to time declare and appoint in that behalf. But section 12 of the Mysore Act (I of 1884) has been repealed by section 14 of Mysore Act (V of 1962).

The High Court of Mysore is by its constitution primarily a Court exercising Appellate Jurisdiction; it is competent to exercise Original Jurisdiction only in those matters in respect of which by special Acts it has been specifically invested with jurisdiction. The High Court is competent to exercise Original Jurisdiction under section 105 of the Trade and Merchandise Marks Act (XLIII of 1958) if it is invested with the Ordinary Original Civil Jurisdiction of a District Court, and not otherwise, and the High Court of Mysore not being invested by any statute or under its constitution with that jurisdiction was incompetent to entertain a passing off action.

But it was urged that in a State the High Court is at the apex of the hierarchy of civil Courts and has all the powers which the subordinate Courts may exercise, and it is competent to entertain all actions as a Court of Original Jurisdiction which may lie in any Court in the State. For this exalted claim, there is no warrant in our jurisprudence. Jurisdiction of a Court means the extent of the authority of a Court to administer justice prescribed with reference to the subject-matter, pecuniary value and local limits. Barring cases in which jurisdiction is expressly conferred upon it by special statutes, e.g., the Companies Act, the Banking Companies Act, the High Court of Mysore exercises Appellate Jurisdiction alone. As a Court of Appeal it undoubtedly stands at the apex within the State, but on that account it does not stand invested with Original Jurisdiction in matters not expressly declared within its cognizance.

Section 24 of the Code of Civil Procedure on which Counsel for the plaintiffs relied lends no assistance to his argument. Among the powers conferred upon a High Court by section 24, Code of Civil Procedure, there is enumerated the power to withdraw any suit, appeal or other proceeding in any Court subordinate to it, and to try or dispose of the same [section 24 (1) (b) (1)]. But jurisdiction to try a suit, appeal or proceeding by a High Court under the power reserved by section 24 (1) (b) (1) arises only if the suit, appeal or proceeding is properly instituted in a Court subordinate to the High Court, and the suit, appeal or proceeding is in exercise of the power of the High Court transferred to it. Exercise of this jurisdiction is conditioned by the lawful institution of the proceeding in a Subordinate Court of competent jurisdiction, and transfer thereof to the High Court. Power to try and dispose of a proceeding after transfer from a Court lawfully seized of it does not involve a power to entertain a proceeding which is not otherwise within the cognizance of the High Court.

Section 151 of the Code of Civil Procedure preserves the inherent power of the Court as may be necessary for the ends of justice or to prevent abuse of the process of the Court. That power may be exercised where there is a proceeding lawfully before the High Court; it does not however authorise the High Court to invest itself with jurisdiction where it is not conferred by law.

Reliance was sought to be placed upon the summary of a judgment dated 6th June, 1962 in a case decided by Narayana Pai, J., *Kaverappa v. Narayanaswamy*.

The learned Judge is reported to have observed that section 24 of the Code of Civil Procedure "read along with section 151 which preserves to the High Court all inherent powers to make such orders as may be necessary for ends of justice necessarily implies that whenever an extraordinary situation so requires, a High Court may confer original jurisdiction upon itself to do or protect ends of justice". It does not appear that the judgment is reported in any series of reports—authorised or unauthorised—and we have not been supplied with a copy of the original judgment. But if the learned Judge, as reported in the summary of the judgment, was of the opinion that the High Court is competent to assume to itself jurisdiction which it does not otherwise possess, merely because an "extraordinary situation" has arisen, with respect to the learned Judge, we are unable to approve of that view. By "jurisdiction" is meant the extent of the power which is conferred upon the Court by its constitution to try a proceeding; its exercise cannot be enlarged because what the learned Judge calls an extraordinary situation "requires" the Court to exercise it.

The appeal must therefore be allowed. Temporary injunction granted by the High Court is vacated and the plaint is ordered to be returned for presentation to the proper Court. As before the High Court, no objection was raised about the maintainability of the suit or the application for injunction, we direct the parties to bear their own costs.

V.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.

Kantendra Jaymukhlal Majumdar

.. *Appellant**

v.

The Collector of Baroda and another

.. *Respondents.*

Bombay Land Requisition Act (XXXIII of 1948), section 9—Power of requisitioning authority on de-requisitioning a premises to ask the allottee in possession of the premises to vacate it—Private arrangement between allottee and landlord as to tenancy—If binding on requisitioning authority after de-requisitioning.

The requisitioning authority under the Bombay Land Requisition Act, 1948 (XXXIII of 1948) can on de-requisitioning a premises, ask the allottee in possession of the premises to vacate it. In view of section 9 of the Act, it was the duty of the Collector, on de-requisitioning the premises, to restore them to the landlord in the condition in which he had taken them in possession. He must deliver vacant possession to the landlord. It was not for the Collector to consider whether there was any private arrangement between the quondam allottee and the landlord with respect to the tenancy of the premises after the de-requisitioning. Nor can such question be a matter for decision by the High Court in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution.

Appeal by Special Leave from the Judgment and Order dated 14/15th January, 1963 of the Gujarat High Court, Ahmedabad, in Special Civil Application No. 215 of 1962.

C. B. Agarwala, Senior Advocate (O. C. Mathur, J. B. Dadachanj and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellant.

N. S. Bindra, Senior Advocate (R. H. Dhebar, Advocate, with him), for Respondent No. 1.

S. T. Desai, Senior Advocate (M. V. Goswami, Advocate, with him), for Respondent No. 2.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This appeal, by Special Leave, raised the question whether the requisitioning authority under the Bombay Land Requisition Act, 1948 (Act XXXIII of 1948) can, on de-requisitioning a premises, ask the allottee in possession of the premises to vacate it.

The premises in suit were requisitioned for the appellant in December, 1953 when he was an Assistant Registrar of the Baroda University. He left the service at Baroda in December, 1957 and was serving at Gorakhpur when the impugned order asking him to vacate the premises was made on 23rd February, 1962.

To appreciate the contentions raised for the appellant, we may set out some further facts. There had been litigation between respondent No. 2 and the appellant in 1958 on the basis that the appellant was the tenant of respondent No. 2. The suit for ejecting the appellant from the premises was instituted on the ground that respondent No. 2 required the premises *bona fide* for personal occupation. It was ultimately dismissed on the ground that the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (LVII of 1947) did not apply to the premises requisitioned by Government in view of section 4 of that Act.

It is urged for the appellant that both on account of respondent No. 2 treating him as a tenant and on account of the provisions of the Requisition Act he became a tenant of the landlord when the premises were de-requisitioned and that therefore the Collector, Baroda, was not competent to order him to vacate the premises. We do not consider there is any force in this contention.

Before discussing this contention, we may refer to the relevant provisions of the Requisition Act and the action taken under them. Sub-section (2) of section 2 empowered the State Government to extend, by notification in the Official Gazette, any or all the provisions of the Act to any other area and on such date as may be specified in the notification. In the exercise of this power, the Government of Bombay issued a notification on 5th August, 1950 extending with effect from 16th August, all the provisions of the Act to the Baroda district. This notification was published in the Bombay Government Gazette dated 17th August, 1950. Sub-section (3) of section 2 empowered the State Government, at any time, to direct by like notification, that any or all the provisions of the Act shall cease to extend to any area. No such notification has been issued by Government rescinding the notification of 5th August, 1950.

Section 4 defines 'land' to include benefits to arise out of land and buildings and all things attached to the earth, or permanently fastened to the buildings or things attached to the earth, and 'premises' to mean any building or part of a building let or/intended to be let separately. Clause (5) of section 4 defines the expression 'to requisition' to mean, in relation to any land, to take possession of the land or to require the land to be placed at the disposal of the State Government. Section 5 authorizes the State Government to requisition any land for any public purpose and the proviso to the section states that a building or part thereof in certain circumstances will not be requisitioned. Sub-section (2) of section 5 also refers to the making of a certain declaration where any building or part thereof is to be requisitioned under sub-section (1). Section 6 deals with requisition of vacant premises in an area specified by the State Government by notification in the Official Gazette. It provides for the landlord of the premises which were to fall vacant to give intimation to the proper officer and not to let out the premises without the permission of the State Government to anyone before giving the necessary intimation and for a month from the date on which the intimation is received. Sub-section (4) of section 6 empowers the State Government to requisition the premises for any public purpose and to use or deal with it for any such purpose in such manner as may appear to be expedient.

Section 8 provides for the payment of compensation with respect to the land requisitioned. Section 8-AA authorizes the Government to deduct the amount spent on the purposes mentioned in that section from the compensation which from time to time becomes due to the owner.

Section 9 deals with matters in connection with release from requisition. Sub-section (1) authorises the State Government to release at any time from requisition any land requisitioned under the Act. Sub-section (2) provides that upon such release the land shall be restored as far as possible in the same condition in which it was on the date on which the State Government was put in possession thereof and that

the State Government shall pay compensation in certain circumstances. Sub-section (3) provides that where any land is to be released from requisition, the State Government may, after making such enquiry as it deems fit specify by order in writing the person to whom possession of the land shall be given, and sub-section (4) states that the delivery of possession of the land to such person shall be a full discharge of the State Government from all liability in respect of such delivery but shall not prejudice any rights in respect of the land which any other person may be entitled by due process of law to enforce against the person to whom possession of the land is so delivered. Sub-section (6) provides that in certain circumstances possession would be deemed to have been delivered on a certain date to the person entitled to possession thereof and that the State Government shall not be liable for any compensation or other claim in respect of the land for any period after the said date, and sub-section (7) provides that for the purpose of releasing any land from requisition, the State Government may by order direct the person to whom the State Government had given possession of such land and other person, if any, in occupation of such land, to deliver possession thereof to the officer authorised in that behalf by the State Government. Section 11 provides that any officer authorised in that behalf by the State Government by a general or special order may take possession of any land in respect of which an order has been made under section 5 or 6 or sub-section (7) of section 9.

Now, the Government of Bombay directed, in the exercise of powers conferred under section 15 of the Act, by notification dated 5th August, 1950, that the powers conferred and duties imposed upon the State Government by the sections specified therein including sections 5, 6 and sub-sections (1), (3), (5) and (7) of section 9 and section 11, shall also be exercised or discharged by the Collectors mentioned in the notification within the limits of their respective jurisdictions. The Collector of Baroda first issued a notification on 29th March 1951 in the exercise of powers conferred by sub-section (1) of section 6 of the Act specifying the area within the limits of the Baroda Municipal Borough as the area for the purpose of the said sub-section (1). The Collector of Baroda requisitioned the premises in December 1953 and allotted it to the appellant.

The Collector, by another notification, dated 13th April, 1954, withdrew the areas specified in the schedule to that order from the operation of section 6 of the Act. The area mentioned in the schedule do not cover the area in which the premises in suit are situate. It follows that the original notification of 29th March, 1951, continued to apply to the area where the premises in dispute were situate.

The Collector issued another notification on 26th December, 1959, specifying the area within the limits of the Baroda Municipal Borough to be the area for the purposes of the said sub-section (1). This notification, in a way, was a duplication so far as the areas which had not been excluded by the Notification of 13th April 1954. The Government rescinded the Collector's order dated 26th December, 1959 by its order, dated 5th December, 1961. In the context of the various notifications, the rescinding of the Collector's order, dated 26th December, 1959, does not affect the application of sub-section (1) of section 6 to the area in which the premises in suit are situate, and, even if it be held otherwise, that would simply debar the Collector from taking any further action under section 6 of the Act, but will not have the result of releasing from requisition premises which had been lawfully requisitioned prior to this order of Government.

In view of section 9 of the Act, it was the duty of the Collector, on de-requisitioning the premises, to restore them to the landlord in the condition in which he had taken them in possession. He took vacant possession from the landlord and therefore had to deliver vacant possession to him. Sub-sections (3) and (7) of section 9 specifically provide for specifying in the order of de-requisitioning, the person to whom possession of the land be given and such person can be the person from whom possession had been obtained by Government or some office of Government specified therefor. It was therefore essential for the Collector to order by his order of de-requisitioning the premises, the vacation of the premises by the appellant and the delivery of possession to respondent No. 2 to whom the Government

had to restore possession in order to relieve itself of any further claims to compensation. The contention that the Collector was incompetent to make such an order is not sound.

It was not for the Collector to consider whether there was any private arrangement between the appellant and the landlord with respect to the tenancy of the premises after the de-requisitioning, and it is rightly conceded that the Collector would not be bound by any such arrangement. Nor can the question of any such arrangement between the two be a matter for decision by the High Court in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution. There is a different forum for the determination of the rights of the two parties, if any.

It was sought to be urged for the appellant that the expression 'to requisition' in section 4 applies to the taking of possession of land and does not apply to the taking of possession of premises, which, according to the appellant, are not included in the term 'land' as defined in sub-section (1). It is argued on this basis that the requisition of the premises in suit was not under the Act. No such question was raised before the High Court and we did not allow learned counsel for the appellant to raise this question in this Court.

We are therefore of opinion that the High Court rightly rejected the writ petition of the appellant.

The appeal is accordingly dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

State of Kerala and another

*Appellants**

v.

The Bhavani Tea Produce Co., Ltd., Punjab

Respondent.

Madras Agricultural Income-tax Act (V of 1955), section 3—Coffee Market Expansion Act (VII of 1922), sections 17, 25, 33 and 34—Coffee delivered by a planter to the Coffee Board—Price received in subsequent years of account—Income, when arises—Mercantile and cash systems of keeping accounts, effect on—Delivery to Coffee Board prior to 1st April, 1954—Income not liable to tax.

It follows from sections 17, 25, 33 and 34 of the Act (VII of 1922) that coffee delivered by a planter under section 25 of the Act becomes the property of the Board no sooner it is so delivered. Even though the planter does not sell coffee to the Board, there is in reality a sale by operation of law as a result of which he ceases to be the owner the moment he has handed over his produce to the Board. The payment of price is from the sale of coffee in the common surplus pool unless, the planter settles for immediate payment.

The system of keeping accounts makes a difference as to when the income arises. If it were a cash system income would be taxable when actually received; but in the mercantile system it would be taxable in the year in which the relevant entry is made about the delivery of coffee to the Board.

Under section 3 of Act (V of 1955) tax is chargeable for such financial year commencing from 1st April, 1955. In the instant cases the sales had taken place (prior to 1st April, 1954)—in the earlier years over which the Agricultural Income-tax Act did not operate—and the accounts were kept in the mercantile system; the High Court was thus right in holding that there was no sale in the years relevant to the assessment years for which the tax was demanded.

Appeals by Special Leave from the Judgments and Orders dated the 9th January, 1962, of the Kerala High Court in Writ Appeals Nos. 154 and 155 of 1961.

P. Govinda Menon and *Dr. V.A. Seyid Muhammad*, Advocates, for Appellants.

M. C. Setalvad, Senior Advocate (*O.P. Malhotra*, Advocate and *J.B. Dadachanji*, *O.C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J.B. Dadachanji & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—These two appeals by Special Leave arise from two petitions under Article 226 of the Constitution in the High Court of Kerala questioning the assessment to Agricultural Income-tax of Bhavani Tea Produce Co., Ltd. (respondent) under the Madras Plantations Agricultural Income-tax Act, 1955 (as extended to Kerala State) for the assessment years 1955-56 and 1956-57 respectively. The High Court decided that certain receipts were not taxable in those assessment years and the State of Kerala is the appellant before us. The assessment year in each case ended on 31st March, of the year and tax was leviable on the results of the previous year. For the first of the two assessment years, corresponding to the previous year ended on 31st March, 1955, the net agricultural income was assessed at Rs. 1,32,198 and a tax of Rs. 45,443-1-0 was demanded by the Department and in the succeeding assessment year, corresponding to the previous year ended on 31st March, 1956, the amounts of net agricultural income and the tax were respectively Rs. 1,24,339 and Rs. 42,810-5-0. The assessee-company claimed that Rs. 97,090 in the first year and Rs. 10,095 in the second year were not taxable although received by the company from the Coffee Board during the relevant accounting years. The company contended that these payments were in respect of coffee delivered by the Company to the Coffee Board under section 25 of the Coffee Market Expansion Act, 1942, in the years 1952-53 and 1953-54, that is to say, prior to 1st April, 1954 when the Madras Plantations Agricultural Income-tax Act came into force and were not assessable as the accounts were maintained on the mercantile system and the amounts were shown in 1952-53 and 1953-54. This plea was not accepted by the Agricultural Income-tax Officer, Coimbatore. His assessment orders, are dated 18th March 1956 and 15th July, 1957, respectively. The Company appealed, but the Appellate Assistant Commissioner by orders passed on 19th December, 1958, dismissed the appeals. The Company appealed further. By a common order dated 25th January, 1960, the Agricultural Income-tax Appellate Tribunal dismissed the appeal in respect of the assessment year 1955-56. In the other appeal the conclusion was the same but the case had to be remanded to ascertain some matters not connected with the present controversy. In both the cases the Department had held that the income was derived in the relevant previous year and this opinion was upheld by the Appellate Tribunal. The Appellate Tribunal observed that :

“amounts actually received in the ‘previous year’ as the price of coffee from the plantation should be regarded as income derived from the plantation in that year irrespective of year to which the crop belongs”

The Company did not apply for revision under section 54 of the Agricultural Income-tax Act, but instead filed petitions under Article 226 of the Constitution against the Agricultural Income-tax Officer, Coimbatore, the Appellate Assistant Commissioner of Agricultural Income-tax, Kozhikode and the Agricultural Income-tax Appellate Tribunal, Trivandrum. The petitions were heard by Mr. Justice Vaidialingam who accepted the contention of the assessee-company and cancelling the assessment orders impugned before him directed the Agricultural Income-tax Officer to make a reassessment of the total income excluding the sums of Rs. 97,090 in the first year and Rs. 10,095 in the second year. The judgment was pronounced on 18th August, 1961. The State of Kerala and the Agricultural Income-tax Officer appealed under the Letters Patent. The appeal was summarily dismissed on 9th January, 1962. It is from this judgment that the present appeals have been filed.

The only question is whether the two amounts were rightly excluded from the assessable agricultural income for the two assessment years. The answer to this question depends on whether under the scheme of the Madras Plantations Agricultural Income-tax Act read with the scheme of the Coffee Act it can be said that the income was only received when the payment was received or when the produce was handed over to the Coffee Board and under the mercantile system of accounting it was entered in the books of account of the assessee-company. If the answer is that income was received when the crop was handed over to the Coffee Board and the entry was made in the books of account under the mercantile system, the judgment under appeal must be considered to be right but if it is the other way, then the action of the Department was correct. We shall now consider this question.

Before we proceed we shall analyse the provisions of the two Acts with which we are concerned. The Madras Plantations Agricultural Income-tax Act consists of 65 sections. It is not necessary to give a full analysis of that Act. For our purpose it is sufficient to refer to some of the provisions only. Section 2 defines "agricultural income", *inter alia*, as any income derived from a plantation in the State and *Explanation II* says that agricultural income derived from such plantation by the cultivation of coffee means that portion of the income derived from the cultivation, manufacture and sale of coffee as may be defined to be agricultural income for the purpose of the enactments relating to Indian Income-tax Act. "Plantation" in the Act means any land used for growing certain crops including coffee. Section 3 lays charge of agricultural income-tax and for our purpose we need read only the first sub-section. It is:

"3. Charge of agricultural income-tax—

(1) Agricultural income-tax at the rate or rates specified in Part I of the Schedule to this Act shall be charged for such financial year commencing from the 1st April, 1955, in accordance with and subject to the provisions of this Act, on the total agricultural income of the previous year of every person.

(2) * * * * *

Section 4 defines "total agricultural income" as the total agricultural income of any previous year of any person from a plantation situate within the State. We are not concerned with the other sections. Some deal with the computation of agricultural income, the expenses which may be deducted, the method of accounting, exemption from the tax under the Act and computation and carrying forward of loss. Some others establish Income-tax Authorities, Appellate Tribunal and provide generally how returns of assessment should be made and sundry matters which have no relevance here. It is thus clear that the income, which is sought to be taxed was the kind of income which is taxable under the Act. This income was derived from coffee grown on a plantation situated within the State and the only question is in which year the income can be said to be received by the assessee-company.

To ascertain this we have to turn to the provisions of the Coffee Market Expansion Act of 1942 because the sale of coffee was not made directly by the assessee but by a Board established under the Coffee Market Expansion Act. That Act replaced an Ordinance of the Governor-General (Ordinance No. XXX of 1940) passed to assist the coffee industry by regulating the export and sale of coffee. As a result of the outbreak of the Second World War, Indian coffee had lost some of its important foreign markets and there arose a great slump in the price of coffee. A Coffee Control Conference convened to consider the situation, suggested steps that could be taken to save the coffee industry in India. Its recommendations led to the passing of the Ordinance of 1940. A second Coffee Control Conference was held in 1941 and after its recommendations were considered by the Standing Advisory Committee of the Legislature attached to the Commerce Department, the present Act was passed. This Act has been frequently amended and today it is called the Coffee Act after the amendment of its title in 1954. We have referred and shall refer, to it by this name. The Coffee Act constituted a Board which was known as the Indian Coffee Market Expansion Board, now called the Coffee Board. The

Coffee Board is a body corporate (having perpetual succession and a common seal) with power to acquire and hold property, both movable and immovable and to contract (section 5). The Coffee Act imposes a duty of customs on all coffee produced in India and exported from India (section 11) and a duty of excise on all coffee which an estate registered under section 14 is permitted, under a scheme of internal sale quota allotted to it, to sell in the Indian market, whether such coffee is actually sold or not, and on all coffee released for sale in India by the Coffee Board from its surplus pool (section 12). The proceeds of these (duties though first credited to the Consolidated Fund of India) may be paid to the Coffee Board and when so paid are credited to a General Fund (section 13). All owners of coffee estates of not less than 10 acres are required to register with a Registering Officer appointed in this behalf by the State Government and the registration once made continues till it is cancelled (section 14). The Central Government fixes the price or prices at which coffee may be sold wholesale or retail in the Indian market and no registered owner or licensed curer or dealer can sell coffee wholesale or retail in the Indian market at a price or prices higher than the price or prices fixed by the Central Government (section 16). Section 17 next provides :

" 17. State of coffee in excess of internal sale quota—

No registered owner shall sell or contract to sell in the Indian market coffee from any registered estate if by such sale the internal sale quota allotted to that estate is exceeded nor shall a registered owner sell or contract to sell in the Indian market any coffee produced on his estate in any year for which no internal sale quota is allotted to the estate."

The internal sale quota is fixed by section 22. Under that section the Coffee Board allots to each registered estate an internal sale quota for the year . Unless with the previous sanction of the Central Government the Coffee Board decides that no internal sale quota shall be allotted, the Board allots to each registered estate an internal sale quota for the year. The internal sale quota is a fixed percentage common to all registered estates, of the probable total production of the estate in the year as estimated by the Board. For the purpose of fixing the quota the registered owner is required to furnish such returns as the Board may demand. The surplus pool to which we have referred means the stock of coffee accumulated by the Board out of the amounts delivered to the Board under section 25. That section is a long section of six sub-sections and they need to be carefully considered. It provides that all coffee produced by a registered estate in excess of the amount specified in the internal sale quota allotted to that estate shall be delivered to the Coffee Board by the owner of the estate for inclusion in the surplus pool. (sub-section 1). Delivery of coffee must be made to the Coffee Board in such places and at such times and in such manner as the Coffee Board may direct and the Coffee Board may give directions for partial delivery to the surplus pool at any time whether the internal sale quota has been exceeded or not and the Coffee Board may reject any defective consignment (sub-section 2). Coffee delivered to the Coffee Board for inclusion in the surplus pool must represent fairly in kind and quality the produce of the estate and such coffee remains under the control of the Coffee Board and the Coffee Board is responsible for its storage, curing (when necessary) and marketing (sub-section 3). The Coffee Board must prepare, from time to time, a differential scale for the valuation of such coffee. In accordance with that scale the Coffee Board must classify each consignment delivered for inclusion in the surplus pool and make an assessment of its value based on its quantity, kind and quality (sub-section 4). Sub-section (5) is not material. Sub-section (6) then provides as follows :—

" 25. Surplus coffee and surplus pool —

*	*	*	*	*
*	*	*	*	*

(6) When coffee has been delivered or is treated as having been delivered for inclusion in the surplus pool, the registered owner whose coffee has been so delivered or is treated as having been so delivered shall retain no rights in respect of such coffee except his right to receive the payments referred to in section 34."

Section 34, which is here referred to, reads :

"34. Payment to registered owners—"

(1) The Board shall at such times as it thinks fit make to registered owners who have delivered coffee for inclusion in the surplus pool such payments out of the pool fund as it may think proper,

(2) The sum of all payments made under sub-section (1) to any one registered owner shall bear to the sum of the payments made to all registered owners the same proportion as the value of the coffee delivered by him out of the year's crop to the surplus pool bears to the value of all coffee delivered to the surplus pool out of that year's crop :

Provided that in calculating the sum of all payments made under sub-section (1) and the value of the coffee delivered to the surplus pool out of the year's crop, respectively, any payment accepted by a registered owner as final payment in immediate settlement for coffee delivered by him for inclusion in the surplus pool and the value of any such coffee shall be excluded."

We may refer to one other section and that is section 33 which confers on the Board power to borrow on the security of the coffee so delivered. It reads as follows :—

"33. Power to borrow—"

The Board may, subject to any prescribed conditions borrow on the security of the general fund or the pool fund for any purposes for which it is authorised to expend money from such fund, or on the security of the coffee delivered or treated as delivered for inclusion in the surplus pool for any purposes for which it is authorised to expend money from the pool fund."

The failure to register, contravention of section 25, making of a false return obstruction and contravention of the other provisions of the Coffee Act, some of which we have not found necessary to mention here, are constituted offences and there is provision for punishment and penalty. The Coffee Board is also given the power to seize coffee withheld from inclusion in the surplus pool. In this way, the marketing of coffee is made the duty of the Coffee Board and the right of a party who has made contributions to the surplus pool is merely to receive payment for coffee which is handed over. The quantum of payment is determined, at first according to the differential scale of valuation prepared by the Coffee Board. It must be remembered that under section 34 (2) the payment is in the proportion which the value of coffee delivered by the owner bears to the value of all coffee delivered to the surplus pool out of one year's crop. But an owner need not wait and may accept an immediate settlement for his coffee. It follows that coffee delivered to the Coffee Board becomes the property of the Board no sooner it is delivered. The Coffee Board can borrow money by pledging it and is not required to return any part of that coffee to the producer. It only sells it and gives to the planter price proportionate to the value of all coffee in the surplus pool for that year, unless the planter settles for an immediate payment.

The appellant company maintains its accounts on the mercantile system. When it handed over coffee to the Coffee Board it entered the price of the coffee according to the valuation of the Coffee Board in its books of account although it did not receive payment immediately because as has been shown above the payment is delayed unless immediate settlement is made. The payment for coffee handed over before 1st April, 1954, was received after that date. No doubt actual payment was received in the previous years relevant to the two assessment years, but coffee was handed over to the Coffee Board in the earlier years for which no tax could be demanded. Was there a sale to the Coffee Board? The answer must be in the affirmative. The Coffee Board is neither a trustee nor even an agent of the planter. It is not accountable to the owner, except as to payment for coffee received and valued according to the differential prices. All coffee, which the Coffee Board obtains under the Coffee Act is put in a pool and gets mixed up with other coffee. Coffee in the pool is disposed of on behalf of the Coffee Board. The Coffee Board only pays a proportionate price to the planter. Even though the planter does not actually sell coffee to the Coffee Board there is in reality a sale by operation of law as a result of which the planter ceases to be the owner of coffee the moment he has handed over his produce to the Coffee Board. He is then entitled to receive payment and is not concerned any more with his coffee. The unsold coffee is not returned to him and he does not enjoy any rights of ownership in it. The Coffee Board can pledge it and sell it as

and when it likes. In these circumstances it is plain that the handing over of coffee by the planter amounts to a sale to the Coffee Board and the payment of the price is from the sale of all the coffee in the surplus pool unless the planter settles for immediate payment. The system of account must make a difference. If it were a cash system income would be taxable when actually received but in the mercantile system it would be taxable in the year in which the relevant entry is made about the sale of coffee to the Coffee Board.

We were referred to some rulings of the Madras and the Kerala High Courts. In *Puthuthottam Estates, (1943) Limited v. Agricultural Income-tax Officer, Coimbatore*¹ Rajagopalan, J., held that there was nothing in the Madras Plantations Agricultural Income-tax Act or the Rules thereunder, which exempted produce gathered earlier than 1st April, 1954 from taxation if payment was received in any previous year relevant to an assessment year under the Madras Plantations Agricultural Income-tax Act. The judgment of Rajagopalan, J., was reversed on appeal in *Puthuthottam Estates (1943) Ltd. v. Agricultural Income-tax Officer*². Rajamannar, C.J., and Jagadisan, J., held that, if the sale took place after 1st April, 1954, tax was payable no matter if the produce was of an earlier year but if the sale took place earlier than that date, tax would not be payable even if the price was realized later. In the Kerala High Court distinction was made between entries under cash and mercantile systems of book-keeping. In *Amalgamated Coffee Estates Ltd. v. State of Kerala*³, the assessee followed the mercantile system and payments entered in the accounting period 1st April, 1953 to 31st March, 1954 were held not taxable even though actually, received after 1st April, 1955. The reasoning in these two cases is the same as in this judgment. It is, therefore, not necessary to refer to them. The judgment under appeal follows the earlier decision of the same Court and the Divisional Bench decision of the Madras High Court, and in our opinion the High Courts have taken the right view of the matter.

The High Court was thus right in holding that there was no sale in the years relevant to the assessment years for which the tax was demanded. The sale had taken place in the earlier years over which the Agricultural Income-tax Act did not operate. The appeals will therefore be dismissed with costs. One set of hearing fees.

K.G.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Chittoor Motor Transport Co. (P.), Ltd.

.. *Appellant**

v.

Income-tax Officer, Chittoor

.. *Respondent.*

Indian Income-tax Act (XI of 1922), sections 10 (2) (vi-b), 35 (11). Development rebate—Transfer of asset by company to firm—Same persons members of both—No profit element—Sale of machinery within ten years period—Rectification of original assessment—Add-back of rebate already granted—Provision whether discriminatory—Constitution of India (1950), Article 14.

For the assessment year 1959-60, the assessee-company with three shareholders, carrying on business in plying transport buses, claimed development rebate in respect of four buses purchased and run during that year and the same was allowed by the Department. In 1959 the shareholders constituted themselves into a firm, and on 30th June, 1959, the company passed a resolution transferring some buses including the four in question to the firm for a consideration, but apparently for little, or no profit. The Company continued its business. The Income-tax Officer, acting under section 35 (11)

1. (1958) 34 I T R. 764

2. (1962) 45 I T R. 86

* G A No. 563 of 1964

3. (1962) 45 I T R. 353.

of the Act issued a notice to the assessee proposing to rectify the assessment by including the development rebate allowed as income of the assessee. The assessee sought to prohibit the Officer by filing a writ petition under Article 226 of the Constitution on the ground that section 10 (2) (vi-b) was repugnant to Article 14 of the Constitution and even if the provision was *intra vires*, there was no transfer by way of sale. The High Court dismissed the petition and hence the appeal,

Held, that section 10 (2) (vi-b) is not repugnant to Article 14 of the Constitution.

The rebate is allowed on conditions which are exactly the same for every assessee, one condition being that if the assessee sells before the expiry of ten years from the end of the year in which it was acquired to a person other than the Government, he would forfeit such rebate. The discrimination if any, arises on the choice made by the assessee.

The object of granting development rebate was to help in the development of industry and in order to achieve this object a condition was put that if the assessee did not utilise it in his own business the rebate would be forfeited or deemed to have been allowed wrongly, *i.e.*, not really for development purposes.

Held further, that the transfer of buses, by the limited company to the partnership firm is a sale and comes within the purview of section 10 (2) (vi-b), whether the transaction resulted in a profit to the company or not.

It would be a sale under the Sale of Goods Act and it would be a sale in any other proper meaning that might be given to the word 'sale'.

Appeal from the Judgment and Order, dated the 17th September, 1963, of the Andhra Pradesh High Court in Writ Petition No. 189 of 1962.

Naunit Lal, Advocate, for Appellant.

Niren De, Additional Solicitor-General of India (*R. Ganapathy Iyer* and *R. H. Dhebar*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—This is an appeal by certificate of the High Court of Andhra Pradesh against its judgment dismissing a petition filed under Article 226 of the Constitution by the appellant. The appellant is a private limited company, hereinafter referred to as the company, and three persons hold shares of the company as under :

	Shares	Amount
		Rs.
Sri C P Sarathy Mudaliar	2,797	27,970
Sri C.P. Singaram	420	4,200
Sri C P. Doraiswamy	500	5,000

The company was doing transport business and for the assessment year 1959-60 (previous year ending 31st March, 1959) it claimed a sum of Rs 48,600 as development rebate in respect of the four new buses purchased by it and brought to use during the year. The Income-tax Officer disallowed the amount but the Appellate Assistant Commissioner, on appeal, allowed the entire sum of Rs. 48,600 as development rebate. On 27th May, 1959, the three shareholders entered into a partnership and the capital of the firm was as follows :

	Rs.
C P. Sarathy Mudaliar	25,000
C P Singaram	10,000
C P. Doraiswamy	10,000
Total	Rs 45,000

On 30th June, 1959, the company passed a resolution transferring a number of motor buses, including the four in respect of which development rebate had been claimed, to the partnership firm for a sum of Rs 2,52,000. The company was not wound up and is still in existence and carrying on business as a transport company. On 7th February, 1962, the Income-tax Officer, purporting to act under section 35 (11) of the Income-tax Act, 1922, hereinafter referred to as the Act, issued a memorandum to the appellant stating *inter alia*, that :

"Since the assets were transferred within 10 years I propose to invoke the provisions of section 35 of the Act and rectify the income by including the rebate allowed as income of the assessee."

He, invited the assessee to give his objections if any.

The appellant thereupon filed a petition in the High Court on 19th February, 1962, praying *inter alia* that the Income-tax Officer be prohibited from proceeding with the rectification of the income-tax assessment for 1959-60, as per the memorandum dated 7th February, 1962. Two points were taken in the petition : first, that section 10 (2) (vi-b) of the Income-tax Act was repugnant to Article 14 of the Constitution ; and, secondly, that assuming that section 10 (2) (vi-b) was *inter vires*, this transaction did not amount to a sale or transfer.

The High Court held that section 10 (2) (vi-b) was not repugnant to Article 14 of the Constitution and that the transaction amounted to transfer within section 10 (2) (vi-b).

The learned Counsel for the appellant, Mr. Naunit Lal, has reiterated the same points before us. Section 10 (2) (vi-b) and section 35 (11) are in the following terms :

"10 (2). Such profits or gains shall be computed after making the following allowances, namely :—

* * * * *

(vi-b) in respect of a new ship acquired or new machinery or plant installed after the 31st day of March, 1954, which is wholly used for the purposes of the business carried on by the assessee, a sum by way of development rebate in respect of the year of acquisition of the ship or of the installation of the machinery or plant, equivalent to :—

(i) in the case of ship....

(ii) in the case of a ship acquired before the 1st day of January, 1958, and in the case of an machinery or plant, twenty-five per cent. of the actual cost of the ship or machinery or plant to the assessee.

* * * * *

and if any such ship, machinery or plant is sold or otherwise transferred by the assessee to any person other than the Government at any time before the expiry of ten years from the end of the year in which it was acquired or installed, any allowance made under this clause shall be deemed to have been wrongly allowed for the purposes of this Act.

35 (11) Where an allowance by way of development rebate has been made wholly or partly to an assessee in respect of a ship, machinery or plant in any year of assessment under clause (vi-b) of sub-section (2) of section 10, and subsequently at any time before the expiry of ten years from the end of the year in which the ship was acquired or the machinery or plant was installed—

(i) the ship, machinery or plant is sold or otherwise transferred by the assessee to any person other than the Government; or

* * * * *

the development rebate originally allowed shall be deemed to have been wrongly allowed, and the Income-tax Officer may, notwithstanding anything contained in this Act, proceed to re-compute the total income of the assessee for the relevant year as if the re-computation is a rectification of a mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply accordingly, the period of four years specified therein being reckoned from the end of the year in which the transfer takes place or the money is so utilised."

There is no doubt that on the true interpretation of section 10 (2) (vi-b) it is clear that if an assessee sells to a person other than the Government at any time before the expiry of ten years from the end of the year in which the motor vehicle was acquired, the allowance is deemed to have been wrongly allowed for the purposes of the Act, but if the assessee sells it to the Government, no such consequence follows.

The learned Additional Solicitor-General says that the object was to help in the development of industry ; indeed the rebate was called "development rebate"; and in order to achieve this object a condition was put that if the assessee did not utilise it in his own business, the rebate would be forfeited or deemed to have been allowed wrongly, *i.e.*, not really for development purposes. He said that by a sale to the Government this object was not defeated because the Legislature assumes that the Government will act in the public interest. In our opinion, there is no discrimination which is hit by Article 14 of the Constitution in this case. The Legislat

has directed the giving of a rebate on conditions which are exactly the same for every assessee, one condition being that if the assessee sells before the expiry of ten years from the end of the year in which it was acquired to a person other than the Government he would forfeit such rebate. This condition is applicable to every assessee and an assessee has a choice of either selling to a person other than the Government and forfeiting the rebate or selling to the Government and keeping the rebate with himself. The discrimination, if any, arises on the choice made by the assessee. The Legislature perhaps presumes that if the machinery is offered to the Government for sale, the Government will only buy it at a price which will take into consideration the rebate taken by the assessee. In our opinion, therefore, it has not been established that section 10 (2) (vi-b) violates Article 14 of the Constitution.

Mr. Naunit Lal then urges that in this case there has been no sale or transfer within section 10 (2) (vi-b). He says that the company consisted of the same three persons as the partnership firm. He further says that it is not a commercial transaction at all and what the latter part of section 10 (2) (vi-b) contemplates is a commercial sale or transfer. In this connection, he relies on *Commissioner of Income-tax v. Sir Homi Mehta's Executors*¹, *Rogers & Co. v. Commissioner of Income-tax*², and *Commissioner of Income-tax v. Mugneeram Bangur*³. In the first case the facts in brief were these. The assessee and his sons formed a private limited company and transferred to that company shares in several joint stock companies, which the assessee had held jointly with his sons for Rs. 40,97,000 which was the market value of the shares at that time. It was found that these shares had cost to the assessee only Rs. 30,45,017 and the Income-tax authorities levied income-tax on the difference between the market price and the cost price of the shares on the ground that the assessee had made a profit to that extent by this transaction. The High Court held that though the assessee and his sons on the one hand and the private limited company formed by them were distinct entities in law but in truth and substance the only result of this particular transaction was that Sir Homi Mehta and his sons held these very shares in a different way from the way they held before the transaction. It observed that they adopted a different mode, the mode of the formation of the limited company with all its advantages, in order to hold these shares and to deal with these shares and to make profit out of these shares. It further held that Sir Homi Mehta did not deal with these shares in the ordinary course as a businessman when he transferred these shares to the private limited company.

In our opinion, this case has no relevance to the question of the interpretation of the words "sold or otherwise transferred" in the latter part of section 10 (2) (vi-b).

The second case *Rogers & Co. v. Commissioner of Income-tax*², is on the same lines. The Calcutta High Court in *Commissioner of Income-tax v. Mugneeram Bangur*³, followed *Doughty's case*⁴, but there too they were not concerned with the interpretation of the words "sold or otherwise transferred".

If we look at the resolution dated 30th June, 1959, it is quite clear that it is a sale for consideration of a number of buses by the limited company to the partnership. It would be a sale under the Sale of Goods Act and it would be a sale in any other proper meaning which might be given to the word "sale". We are not concerned whether any profit resulted to the assessee, but what we are concerned with is whether the assessee had sold or transferred these buses to the partnership. To us the answer seems to be plain that whether the transaction resulted in profit to the company or not, the transaction comes within a purview of the latter part of section 10 (2) (vi-b).

In the result the appeal fails and is dismissed with costs.

V S.

Appeal dismissed.

1 (1955) 28 I.T.R. 928; I L.R. (1956) Bom 154.
 154. 58 Bom L.R. 112. A I.R. 1956 Bom 415.
 2 (1958) 34 I.T.R. 336. (1958) Bom L.R.
 366. I.L.R. (1958) Bom 1203. A I.R. 1959 Bom.

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3. (1963) 47 I.T.R. 565
 4 L.R. (1927) A.C. 327

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH J. C. SHAH AND S. M. SIKRI, JJ.

Hari Krishna Bhargav

.. Petitioner*

v.

Union of India and another

.. Respondents.

Income-tax Act (XLIII of 1961), Chapter XXII-A—Incorporation of scheme of annuity deposits—Constitutional validity—Provisions of colourable exercise of legislative power—If discriminatory—Constitution of India, 1950, Art. 14, schedule 7, List I, Entries 82 and 97.

The petitioner contended that the scheme of annuity deposit incorporated in Chapter XXII-A of the Income-tax Act of 1964 (by the Finance Act V of 1964) is invalid because (i) the Parliament had no competence to so incorporate a provision substantially one relating to borrowings by the Central Government; (ii) the provisions therein are enacted in colourable exercise of legislative power; in any event they are harsh and unconscionable and so not within the competence of Parliament and (iii) the provisions of S. 208-X and schedule II are discriminatory and infringe the fundamental freedom under Article 14 of the Constitution.

Per *Gajendragadkar, C J., Wanchoo, Shah and Sikri, JJ.*—In our view there is no substance in any of the contentions.

Granting that the scheme of Chapter XXII-A is for borrowing money by the Central Government from the tax-payers in the higher income group at the rates prescribed, which is repayable in instalments, power to legislate in that behalf is still within the competence of Parliament by virtue of Entry 97 of List I of the Seventh Schedule of the Constitution.

If Parliament has the power to legislate for collecting annuity deposits from tax-payers,—it is not objected to, there is nothing in the Constitution which disentitles Parliament as a matter of legislative arrangement to incorporate the provisions relating to borrowing from tax-payers in the Income-tax Act or any other statute. There is no prohibition against Parliament enacting in a single statute, matters which call for the exercise of power under two or more entries in List I of the Seventh Schedule. The fact that one of such entries is the residuary entry does not also attract any disability. The question is one of convenience and not of power.

In exercising power to legislate for collecting annuity deposits, Parliament has not sought to resort to any pretence, disguise or subterfuge with the object of trespassing upon power not vested in it by the Constitution. The doctrine of colourable legislation therefore can have no application where Parliament is invested with the authority to legislate in respect of annuity deposit and it exercises that power.

A taxing statute may be open to challenge on the ground that it is expropriatory, or that the statute prescribes no procedure or machinery for assessing tax, but it is not open to challenge merely on the ground that the tax is harsh or excessive.

There is no unlawful discrimination between tax-payers in the scheme of annuity deposit. Neither the exemption of tax-payers, having an income below Rs 15,000 nor the progressively steeper rates of demand can be regarded as unreasonable. The view of the Legislature that in the higher income groups there would be larger savings cannot also be said to be unreasonable. It is true that a slab-system in vogue for the computation of non-corporate income-tax has not been adopted, and the demand of deposit is made at a steeply rising percentage on the adjusted total income. But that by itself is not a ground for regarding the levy as unreasonable. Though a distinction is made between persons who are below the age of seventy years on the last day of the previous year, and those who have attained that age, it is difficult to regard the provision exempting the latter class of persons from liability to pay additional tax as depriving other tax-payers below the age of seventy who have exercised the option under section 280-X (1) of the guarantee of equal protection of the laws.

Per Hidayatullah, J. (concurring).—The annuity deposit is an alternative to paying income tax and is a means of reduction in the amount of income-tax. The provisions relating to it rightly came under Entry 82 of List I dealing with taxes on income. The money so collected is returned with interest in equal instalments spread over ten years and the amount is taxable in the year of refund. The entry thus covers it.

Petition under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.

N. D. Karkhanis, Advocate, *E. C. Agarwala* and *P. C. Agarwala*, Advocates, for Petitioner.

C. K. Daphtary, Attorney-General for India and *S. V. Gupte*, Solicitor-General of India (*R. Ganapathy Iyer* and *R. H. Dhebar*, Advocates, with them), for Respondents.

The following Judgments of the Court were delivered :

Shah, J. (for himself, *P. B. Gajendragadkar, C.J., Wanchoo* and *Sikri, JJ.*).—The petitioner who is a trader at Meerut was ordered by the Income-tax Officer, D-Ward, Meerut, to pay Rs. 1,800 as annuity deposit under Chapter XXII-A of the Income-tax Act, 1961. The petitioner has filed this petition challenging the validity of the demand on the plea that Chapter XXII-A of the Income-tax Act is unconstitutional and is otherwise violative of the fundamental right guaranteed by Article 14 of the Constitution.

The Indian Income-tax Act 43 of 1961 was enacted by the Parliament to consolidate and amend the law relating to Income-tax and Super-tax. The Act came into force on 1st April, 1962. The Parliament enacted Finance Act 5 of 1964 to give effect to the financial proposals of the Central Government for the financial year 1964-65, and by section 3 (1) of that Act it was provided :

“ Save as otherwise provided in Chapter XXII-A of the Income-tax Act, annuity deposit for the assessment year commencing on the 1st day of April, 1964 shall be made by every person to whom the provisions of that Chapter apply at the rates specified in the Second Schedule ”

By section 44 of the Finance Act, Chapter XXII-A relating to annuity deposits containing sections 280-A to 280-X was introduced into the Income-tax Act. By that Chapter taxpayers of certain categories are required to make annuity deposits for every assessment year commencing from the assessment year 1964-65. By the Second Schedule to the Finance Act, rates of annuity deposits are prescribed. The deposit has to be made by the specified categories of taxpayers, having a total income exceeding Rs. 15,000 at the prescribed percentages rising from 5 to 12½ on the adjusted total income. By the *Explanation* to the Second Schedule, the expression “ total income ” under the Schedule means the total income computed in the manner laid down in the Income-tax Act without making any allowance under section 280-C of that Act. A taxpayer who is a resident and falls within any of the following categories is liable to make the annuity deposit :

- “ (i) an individual, who is a citizen of India,
- (ii) a Hindu undivided family,
- (iii) an unregistered firm,
- (iv) an association of persons or a body of individuals, whether incorporated or not (other than a company or a co-operative society), and
- (v) an artificial juridical person referred to in sub-clause (vii) of clause (31) of section 2 or the Income-tax Act (other than a corporation established by a Central, State or Provincial Act) ”

All non-residents and all companies and corporations and co-operative societies established by Central, State or Provincial Acts are accordingly exempted from the operation of the annuity deposits scheme. But a taxpayer who is required by section 280-A to make an annuity deposit may exercise his option not to make it, by a notice in writing to the Income-tax Officer before the 30th of June of the assessment year. The option once exercised is irrevocable, and operates in respect of the assessment year and all subsequent years. The taxpayer who exercises the option has to pay besides the income-tax payable on his total income, additional income-tax which

s equal to half of the amount which he saves by not making the deposit. But an individual who on the last day of the relevant previous year is more than seventy years of age is exempt from payment of this additional income-tax. Section 280-B defines, amongst other expressions, "adjusted total income," a percentage of which is by the Second Schedule liable to be deposited as annuity deposit. Annuity deposit has to be made in advance on the adjusted total income of the previous year, at the rate or rates prescribed by any Central Act. Authors, play-wrights, artists, musicians and actors are permitted to make at their option, deposit up to 25 per cent. of the amount derived from their profession, in addition to the amount which they are required to make. A person receiving gratuity from his employer in excess of the amount exempt from income-tax has the option of making an annuity deposit not exceeding 50 per cent. of the amount of gratuity chargeable to income-tax, in addition to the amount he is required to make. The annuity deposit is repayable in ten annual equated instalments of principal and interest at such rates as may be prescribed. The amount of annuity deposit payable by a taxpayer in any year is admissible as a deduction in computing his total income charged to tax for that year. If the adjusted total income of an assessee includes income chargeable to income-tax under the head "salaries", allowances has to be made in computing the income under that head, and if there be no income under that head or the annuity deposit required to be made exceeds the salary income, the whole of the balance of the annuity deposit is allowable as a deduction in computing the total earned income. The instalment of annuity due on any annuity deposit is chargeable to income-tax as earned income of the taxpayer in the year in which it becomes due. The Income-tax Officer on or after the 1st day of April, in the financial year, may by order in writing, require the depositor who has been previously assessed, to make an advance deposit computed in accordance with section 280-E. The Income-tax Officer is also authorised to issue a demand notice and also to modify, if necessary, the notice of demand after regular assessment has been made. A depositor may make his own estimate of his adjusted total income before the last instalment is due, that his adjusted total income for the previous year is less than the income in respect of which he is required to make the deposit. A taxpayer who fails to pay the annuity deposit by the due date is exposed to a penalty which may amount to as much as 50 per cent. of the deposit required to be made by him. A taxpayer who received income of the nature of commission, which forms part of his adjusted total income, may defer making advance deposit, when commission is receivable periodically and is not received or adjusted by the payer in the depositor's account. A person who has not been previously assessed to income-tax is liable to pay penalty if he fails to make an advance deposit on his own estimate. The Income-tax Officer is entitled to determine annuity deposit on the basis of provisional assessment or regular assessment and he is entitled to recompute the annuity deposit, when the total income of the assessee is enhanced or reduced, or the status under which he is assessed is altered or when the registration of a firm is cancelled. Arrears of annuity deposit and penalty are recoverable in the manner provided in Chapter XXII-D of the Income-tax Act for the recovery of income-tax.

Broadly stated, the scheme of Chapter XXII-A is that certain classes of taxpayers in the comparatively higher income groups are required to make out of their total income deposits at the specified rates on the adjusted total income, with the Central Government. The amount so deposited is made returnable with interest in ten annual instalments. In computing the total income of the year in which it is made the deposit is an admissible deduction. But the instalment due in any year is liable to be adjusted in the total income of the year in which it is due. The taxpayer however has the option not to pay the deposit, and pay tax on his total income and fifty per cent. of the amount saved by not making the deposit.

The petitioner submits that the scheme of annuity deposit incorporated in Chapter XXII-A is invalid because (a) the Parliament had no competence to incorporate in the Indian Income-tax Act, a provision which was substantially one relating to borrowings by the Central Government from a class of taxpayers; (b) the provisions contained in Chapter XXII-A are enacted in colourable exercise of legislative power,

and that in any event they are so harsh and unconscionable that they may be regarded as expropriatory and on that account not within the legislative competence of the Parliament and (c) the provisions of section 280-X and Schedule II are discriminatory and infringe the fundamental freedom under Article 14 of equality before the law.

In our view there is no substance in any of the contentions. The Parliament has by Article 246 read with Entry 82 in List I of the Seventh Schedule power to levy "taxes on income other than agricultural income". The Indian Income-tax Act, 1961 and the provisions of the annual Finance Acts of the Parliament which authorise levy of income-tax at the rates prescribed thereby are undoubtedly enacted in exercise of the powers conferred by Entry 82 in List I. Granting that the scheme of Chapter XXII-A is for borrowing money by the Central Government from the taxpayers in the higher income group at the rates prescribed, which is repayable in instalments, power to legislate in that behalf is still within the competence of the Parliament by virtue of Entry 97 of List I of the Seventh Schedule. Counsel for the petitioner does not contend that power to collect annuity deposit is outside the Parliament's competence; he merely urges that the Parliament could not incorporate the provisions relating to the exercise of the power of borrowing exercisable under Entry 97 in a legislation which was exclusively enacted in exercise of the powers under Entry 82. But if the Parliament has the power to legislate for collecting annuity deposits from taxpayers, there is nothing in the Constitution which disentitles the Parliament as a matter of legislative arrangement to incorporate the provisions relating to borrowing from taxpayers in the Income-tax Act or any other statute. There is no prohibition against the Parliament enacting in a single statute, matters which call for the exercise of power under two or more entries in List I of the Seventh Schedule. Illustrations of such legislation are not wanting in our statute book, and the fact that one of such entries is the residuary entry does not also attract any disability. The question is one of convenience and not of power. It appears that the Parliament thought, that the provisions relating to annuity deposits could appropriately be incorporated in the Indian Income-tax Act, 1961. The Parliament did enact the Compulsory Deposit Scheme Act, 1963, as a separate statute, but that does not mean that it had no power to incorporate it within the Income-tax Act, if the Parliament so desired. The Income-tax Act, 1961, is a longish statute and incorporation of other provisions therein may make it somewhat unwieldy. But it must be said that the Chapter relating to the annuity deposit scheme is closely related to the scheme of levy of income-tax. The power of assessment, and collection of annuity deposit is entrusted to Income-tax Officers, and the machinery of the Income-tax Act is utilised for that purpose. The annuity deposit is based on the total income of the taxpayer; if the taxpayer pays the deposit he is entitled to deduction of the amount in the computation of income-tax, and if he exercises the option not to pay the deposit, he is rendered liable to pay additional income-tax. The annuity deposit and the penalty payable for failure to make the deposit without exercising the option are made recoverable in the manner provided by Chapter XVII-D for the recovery of arrears of income-tax. If the Annuity Deposit Act were enacted as a separate Act, several provisions requiring references to the Income-tax Act and conferment of power upon the authorities constituted under the Income-tax Act would have had to be duplicated. To avoid repetition and cross references the Legislature has thought it proper to enact within the Indian Income-tax Act those provisions relating to annuity deposits and has conferred upon the Income-tax Officer power to assess and collect annuity deposits, and exercise of that power may not be cavilled even by a purist in draftsmanship.

The argument that Chapter XXII-A is a colourable exercise of legislative power has no substance. As pointed out by this Court in *K. C. Gajapati Narayan Deo and others v. The State of Orissa*¹:

" * * * the doctrine of colourable legislation does not involve any question of *bona fides* and *mala fides* on the part of the Legislature * * * Whether a statute is constitutional or not is * * * always a question of power * * * If the Constitution of a State distributes the legislative powers

amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the Legislature in a particular case has or has not, in respect of the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect, and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a Legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be mere pretence or disguise."

It is not suggested that the power to legislate for collection and repayment of annuity deposits is within the power of the States under List II of the Seventh Schedule. If the Parliament has the power to enact legislation for levying, assessing and collecting annuity deposits and for repayment in annual instalments, by enacting that legislation the Parliament does not trespass upon powers outside its domain. In exercising power to legislate for collecting annuity deposits, the Parliament has not sought to resort to any pretence, disguise or subterfuge with the object of trespassing upon power not vested in it by the Constitution. The doctrine of colourable legislation therefore can have no application where the Parliament is invested with the authority to legislate in respect of annuity deposit and it exercises that power.

It was urged that even if the exercise of the powers to compel deposits be regarded as not unconstitutional, its exercise is harsh and the demands made by the State are excessive. Exercise of the taxing power of the State has undoubtedly to be tested in the light of the fundamental freedoms guaranteed by Chapter III of the Constitution. It is not a power which transcends the fundamental rights, as was assumed in certain earlier decisions : *Ranjilal v. Income-tax Officer*¹, *Laxmanappa Hanumantappa v. Union of India*², and the view expressed by Venkatarama Ayyar, J. in *S. Anantha Krishnan v. State of Madras*³. But it is now settled by decisions of this Court (e.g.) *Kunnathat Thatunni Moopil Nair v. The State of Kerala and another*⁴, that a taxing statute is subject to the "conditions laid down in Article 13 of the Constitution". A taxing statute may accordingly be open to challenge on the ground that it is expropriatory, or that the statute prescribes no procedure or machinery for assessing tax, but it is not open to challenge merely on the ground that the tax is harsh or excessive.

The argument that the scheme of annuity deposit makes an unlawful discrimination between taxpayers is also devoid of force. Article 14 of the Constitution guarantees equality before the law, and equal protection of the laws. But thereby the power of the Legislature to make a reasonable classification of persons, objects or transactions for attaining certain objectives is not excluded. If a classification is based on some real and substantial distinction, bearing a just and reasonable relation to the objects sought to be achieved, it is valid. It is true that an assessee whose total income does not exceed Rs. 15,000 is not liable to pay any annuity deposit, and the demand for annuity deposit, unlike income-tax is based on a progressively increasing percentage of the adjusted total income, and for a person having a total income exceeding Rs. 70,000 the rate of deposit is as high as 12½ per cent. But neither the exemption of taxpayers having an income below Rs. 15,000 nor the progressively steeper rates of demand can be regarded as unreasonable. What is sought to be achieved by the Act is the twin objective of mobilisation of private savings for public purposes and imposing curbs on the inflationary trends in the economy of our country. To secure this purpose, provision has been made to collect what may reasonably be assumed to be surplus income or private savings so as to make them available for national development.

The Legislature has been of the view that persons who have an income exceeding Rs. 15,000 per annum at the present level of taxation, and the ruling prices may be able to make savings which may usefully augment the public finances. Nothing

1. (1951) S.C.J. 203 : (1951) 1 M.L.J. 384 : (1951) S.C.R. 127 : A.I.R. 1951 S.C. 97. 3. (1952) 1 M.L.J. 208 : I L.R. (1952) Mad 933 : A.I.R. 1952 Mad. 395.
2. (1955) S.C.J. 590 : (1955) 2 M.L.J. (S.C.) 94 : (1955) 1 S.C.R. 769 : A.I.R. 1955 S.C. 3. 4. (1961) 2 S.C.J. 269 : (1961) 3 S.C.R. 77 : A.I.R. 1961 S.C. 552.

has been placed before us to show that the view is not reasonable. The view of the Legislature that in the higher income groups there would be larger savings cannot also be said to be unreasonable. It is true that a slab system in vogue for the computation of non-corporate income-tax has not been adopted, and the demand of deposit is made at a steeply rising percentage on the adjusted total income. But that by itself is not a ground for regarding the levy as unreasonable. In order to do away the anomalies the Schedule of rates has provided marginal adjustments. It may also be noticed that simultaneously with the introduction of the annuity deposits scheme, the personal rates of income-tax have been reduced. Again it may be noticed that the scheme for the annuity deposits is in a sense not compulsory. By making a declaration it is open to an assessee not to make the contribution as required by the Act. He may elect not to make the deposit, and pay Income-tax on his total income. If he has not attained the age of seventy years on the last day of the previous year he will also have to pay additional income-tax as prescribed by sub-section (2) of section 280-X. There is undoubtedly a distinction made between persons who are below the age of seventy years on the last day of the previous year, and those who have attained that age : the former on exercising the option not to pay annuity deposits will have to pay tax on the total income and additional income-tax, the latter will only pay tax on total income but not additional income-tax. The Legislature is apparently of the view, having regard to the life span in our country, capacity to engage in gainful employment and other relevant circumstances, that the latter should be exempted from payment of additional tax. Every taxpayer who is otherwise required to make a deposit is permitted to declare his option under section 280-X (1) and once he does so, he is not liable to make the annuity deposit. Such a taxpayer will be obliged to pay income-tax on his total income. Only a section out of this class of taxpayers are exempted from liability to pay additional Income-tax. It is difficult to regard the provision exempting this class of persons from liability to pay additional tax as depriving other taxpayers below the age of seventy who have exercised the option under section 280-X (1) of the guarantee of equal protection of the laws. The classification is *prima facie* reasonable, and the petitioner has placed no materials before us to prove that it is not genuine or has no rational nexus to the object sought to be achieved by the Parliament.

The petition fails and is dismissed with costs.

Hidayatullah, J.—I agree that this petition should be dismissed with costs. I agree generally with the reasons given by my brother Shah, but I wish to say that I do not rest my decision on Entry No. 97 of List I of the Seventh Schedule. It was argued that Entry No. 97 of List I must in any event cover this tax even if the entry relative to income-tax was inadequate to cover it. The very frequent reliance on Entry No. 97 makes me say these few words. That entry, no doubt, confers residuary powers of legislation or taxation but it is not an entry to avoid a discussion as to the nature of a law or of a tax with a view to determining the precise entry under which it can come. Before recourse can be had to Entry No. 97 it must be found as a fact that there is no entry in any of the three Lists under which the impugned legislation can come. For if the impugned legislation is found to come under any entry in List II, the residuary entry will not apply. Similarly, if the impugned legislation falls within any entry in one of the other two Lists recourse to the residuary entry will hardly be necessary. The entry is not a first step in the discussion of such problems but the last resort. One cannot avoid the issue by taking its aid unless such a course is open. It is always necessary to examine the pith and substance of any law impugned on the ground of want of legislative competence with a view to ascertaining the precise entry in which it can come. The entries in the three Lists were intended to be exhaustive and it would be a very remote chance that some entry would not suit the legislation which is impugned. I shall, therefore, examine the law relating to annuity deposits from this angle first.

The relevant provisions have been summarized by my brother in great detail. The essence of these provisions, apart from the machinery sections which are either supplementary to or fitted into, the scheme of the Indian Income-tax Act, 1961, is that a person, with an income above a certain sum, may, if he so chooses and as an

alternative to paying the full tax due on his income, make an annuity deposit and earn some present partial relief from taxation. It is not necessary to state the extent of the relief or the extent of the deposit. This is the scheme in a nut-shell. Now it is undoubtedly open to Parliament to give relief from a part of the income-tax the assessee has to pay on the condition that a particular amount is put into an annuity deposit. The deposit is not obligatory. Any person can elect to pay the full tax and not take advantage of the scheme. The pith and substance of the impugned provisions, therefore, rightly belong to the topic of taxes on income. The annuity deposit is in lieu of some tax and the machinery sections also take the aid of the machinery of the Indian Income-tax Act. As the enforcement of the provisions is by the agency of the Income-tax Department—and they are intimately connected with income-tax—the provisions are very appropriately included in the Income-tax Act. No doubt the provisions for the management of the annuity deposits deal with matters slightly out of place in a pure taxing measure but our Constitution has not created a water-tight compartment as is to be found in the Commonwealth of Australia Act. Our Income-tax Act can reasonably contain provisions on incidental matters and the management of annuity deposit under the scheme is such a matter.

It is argued that this is a case of “borrowing” which is defined in Article 366 (4) to include the raising of money by the grant of annuities, and “loan” is also required to be construed accordingly. It is submitted that if money was to be raised by the grant of annuities the action should have been by an Act giving effect to Article 292. Article 292 reads :

“292. *Borrowing by the Government of India—*

The executive power of the Union extends to borrowing upon the security of the Consolidated Fund of India within such limits, if any, as may from time to time be fixed by Parliament by law and to the giving of guarantees within such limits, if any, as may be so fixed”

Borrowing under that Article is by executive action and it is on the security of the Consolidated Fund of India. A similar power is granted to the Executive of the State by Article 293. This is not a legislative power except in so far as law may be made to fix the limits of borrowing and to the giving of guarantees within such limits. Otherwise it is a power for the exercise of the Executive.

Here the annuity deposit is an alternative to paying income-tax and is a means of reduction in the amount of income-tax. The provisions relating to it rightly came under Entry No. 82 of List I dealing with taxes on income. The money so collected is returned with interest in equal instalments spread over ten years and the amount is taxable in the year of refund. The entry thus covers it.

There is no entry in List II which can be said to take in the law relating to Annuity Deposits. Entry No. 30 (money-lending and money-lenders) has to be mentioned and rejected. As the subject of the annuity deposit provisions is capable of being comprehended in the entry relating to taxes on income I do not feel called upon to invoke the aid of Entry No. 97 by assuming that no Entry covers such provisions. This will be a fundamental error in approach to such problems. The provisions are neither colourable nor discriminatory. They apply to upper income groups and this does not lead to discrimination. They are not colourable because, though called annuity deposits, they only defer payment of tax on a part of the assessable income and the name does not matter at all. Instead of charging income-tax on the amount forthwith the amount is ordered to be kept in deposit with Government, one-tenth being returned with interest every year. The returned amount then bears the tax. An election once made is final.

I agree, therefore, that the petition be dismissed with costs.

K. G. S.

Petition dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND R. S. BACHAWAT, JJ.
 Thayyil Mammo and another .. Appellants*

v.

Kottiath Ramunni and others .. Respondents.

Deed—Construction—Document styled release deed—When can operate as an assignment.

A registered document styled release deed in respect of kanom right contained the following operative part:—"Since I have this day received to satisfaction in ready cash the sum of Rs 935 made up of the above balance purappad of Rs 135 and the kanom amount of Rs 800, and which you have paid to me, the entire rights, liabilities and claims belonging to me under the aforesaid kanom deed No 266 and marupat deed No 267, have been surrendered to you "

Held, on its true construction the document was a transfer. A registered instrument styled a release deed releasing the right, title and interest of the executant in any property in favour of the release for valuable consideration may effect a transfer. Though the word surrender is used and though the document is styled a release deed in the instant case, it operates as an assignment. The releasees thus became the kanomdars and are consequently protected from eviction under the Kerala Land Reforms Act, 1963

Appeal by Special Leave from the Judgment and Decree, dated 20th July, 1961, of the Kerala High Court in Second Appeal No. 675 of 1956.

A. V. Viswanatha Sastri, Senior Advocate, (P. A. Mohammed and Dr. V. A. Seyid Mohammed, Advocates, with him), for Appellants.

R. Gopalakrishnan, Advocate, for Respondents Nos. 1 to 10.

The Judgment of the Court was delivered by

Bachawat, J.—The properties in suit belonged to the Muzhappilangad Devaswam in jenmi rights, and under the Devaswam, the Thayyil tarwad had leasehold rights. One Thayyil Mayan came to hold the properties under a *Kawasam Panayam* deed executed by the Thayyil tarward. On 5th February, 1929, Mayan and his brothers, Abubacker and Kader executed a kanom (Exhibit A-3) of the suit properties in favour of Bathala Baithan. By a marupat (Exhibit A-4) executed on the same day, Mayan took back the properties on lease from Baithan. Subsequently, by Exhibit A-5 and later Exhibit A-7, Mayan leased items 3 to 5 of the suit properties to Koran. In early 1939, Mayan died leaving defendants 7 to 13 as his heirs. By a deed (Exhibit A-8), dated 28th April, 1939, Abubacker obtained a surrender of the leasehold rights from Koran. On 15th May, 1939, Abubacker executed a kanom (Exhibit A-10) in respect of all the suit properties in favour of Kottiath Raman. Raman died shortly thereafter leaving defendants 1 to 5 as his heirs. By a registered deed (Exhibit B-2), dated 27th February, 1941, defendants 1 to 5 obtained from Baithan a surrender of his kanom rights under the deed dated 5th February, 1929. The third defendant died during the pendency of the suit leaving defendants 18 to 23 as her legal representatives. By a deed dated 9th April, 1947, defendants 7 to 13, the heirs of Mayan, assigned their rights in the suit properties to the plaintiffs. On 4th October, 1947, the plaintiffs instituted a suit for recovery of possession of the suit properties on payment of the kanom amount payable under the kanom dated 5th February, 1929. The defendants claimed protection from eviction. The trial Court decreed the suit. The first appellate Court confirmed the decree. On second appeal, the High Court dismissed the claim for possession and mesne profits and instead, granted a decree for the michavaram due under Exhibits A-3 and A-7. The plaintiffs now appeal to this Court by Special Leave.

The Courts below concurrently held that Mayan exclusively held the rights in the suit properties acquired under the *Kawasam Panayam* deed dated 11th August, 1919, and Abubacker and Kader had no right therein, the plaintiffs duly acquired the

rights of Mayan under the assignment, dated 9th April, 1947, and Abubacker could not lawfully grant kanom rights under Exhibit A-10 to defendants 1 to 5. The first two Courts held that the kanartham in respect of the kanom dated 5th February, 1929, exceeded 40 per cent of the value of the jenmis' rights in the holding and accordingly the defendants could not claim any fixity of tenure and protection from eviction under clause (iii) of the second proviso to section 23 read with section 21 of the Malabar Tenancy Act, 1929 (Madras Act XIV of 1929). The District Court also held that the surrender deed (Exhibit A-8), dated 28th April, 1939, could not operate as assignment of the leasehold rights of Koran in respect of items 3, 4 and 5 of the suit properties and consequently the kanom (Exhibit A-10), dated 15th May, 1939, could not operate as a sub-lease of those properties by Abubacker to Raman and the defendants could claim no protection from eviction under section 43 of the Malabar Tenancy Act.

During the pendency of the appeal to the High Court the Kerala Stay of Eviction Proceedings Act, 1957 (I of 1957) came into force, and the appeal was stayed under the Act. On 21st February, 1961, the Kerala Agrarian Relations Act, 1960 (IV of 1961) came into force, and the appeal came up for disposal in accordance with section 95 of the Act. The appeal was finally disposed of on 20th July, 1961. Both parties admitted before the High Court that the deed (Exhibit A-3), dated 5th February, 1929, was a kanom within the meaning of the Kerala Agrarian Relations Act, 1960. The High Court held that the deed of surrender (Exhibit A-8), dated 28th April, 1939, operated as an assignment of Koran's rights to Abubacker in respect of items 3, 4 and 5 of the suit properties and the kanom (Exhibit A-10), dated 15th May, 1939, operated as a sub-lease by Abubacker in respect of those properties. The High Court also held that the deed of surrender (Exhibit B-2) dated 27th February, 1941, operated as an assignment of the kanom rights of Baithan in favour of defendants 1 to 5. The High Court held that consequently defendants 1 to 5 became the tenants of the suit properties, and were entitled to fixity of tenure and protection from eviction under the Kerala Agrarian Relations Act.

On 5th December, 1961, this Court struck down a portion of the Kerala Agrarian Relations Acts, 1960 as unconstitutional. Later, in November, 1962, the Kerala High Court struck down several other provisions of the Act as unconstitutional. During the pendency of this appeal, the Kerala Land Reforms Act, 1963 (I of 1964) came into force. This Act repealed the Kerala Agrarian Relations Act, 1960, and sub-section (4) (iii) of section 132 of the Act provided that subject to the provisions of clause (ii), the Kerala Agrarian Relations Act, 1960 shall not be deemed to have conferred any right or imposed any liability on any person as if the said Act had not been enacted. The rights of the parties must now be decided in accordance with the provisions of the Kerala Land Reforms Act, 1963. Section 2 (22) of that Act defines "kanom." By section 2 (57), a tenant includes a kanomdar. Section 13 provides that notwithstanding anything to the contrary contained in any law, custom, usage or contract, or in any decree or order of Court, every tenant shall have fixity of tenure in respect of his holding, and no land from the holding shall be resumed except as provided in sections 14 to 22 of the Act. The only question in this appeal is whether the contesting defendants are kanomdars and therefore tenants within the meaning of the Act.

The contesting defendants claimed (1) that the rights granted by Mayan to Baithan under the deed (Exhibit A-3), dated 15th February, 1929, are kanom rights, and (2) the deed (Exhibit B-2), dated 27th February, 1941, operates as a valid assignment of the aforesaid kanom rights by Baithan to defendants 1 to 5.

Mr. Viswanatha Sastry contended that the rights granted by Exhibit A-3 were rights of a usufructuary mortgagee, and were not kanom rights. We think that this contention is not open to Mr. Viswanatha Sastry. In the High Court, the appellants expressly conceded that Exhibit A-3 was a kanom within the meaning of the Kerala Agrarian Relations Act, 1960. The definition of kanom in section 2 (22) of the Kerala Land Reforms Act, 1963 is for all practical purposes the same

as the definition of kanom in section 2 (18) of the Kerala Agrarian Relations Act, 1960. Having regard to the admissions made by the appellants in the High Court, it must be held that Exhibit A-3 was a kanom within the meaning of the Kerala Land Reforms Act, 1963.

Mr. Viswanatha Sastry next contended that Exhibit B-2 is a deed of surrender and cannot be construed as a deed of assignment of the kanom rights in favour of defendants 1 to 5. Now, Exhibit B-2 is styled release deed in respect of kanom rights, and its operative part reads as follows :

" Since I have this day received to satisfaction in ready cash the sum of Rs 935 made up of the above balance purappad of Rs. 135 and the kanom amount of Rs 800, and which you have paid to me, the entire rights, liabilities, and claims belonging to me under the aforesaid kanom deed No 266 and marupat deed No 267 have been surrendered to you."

It may be noticed that the kanom deed No. 266 is Exhibit A-3 and the marupat deed No. 267 is Exhibit A-4.

Exhibit B-2 was registered. It was executed for a consideration paid by defendants 1 to 5 to Baithan. It discloses an intention to transfer the kanom rights of Baithan to defendants 1 to 5 ; its operative words are capable of passing the title, and on its true construction, it operates as an assignment. Mr. Viswanatha Sastry suggested that Exhibit B-2 was stamped as a release and not as an assignment. But the paper book does not disclose the amount of the stamp paid on it. Moreover, the nomenclature of the deed and the amount of the stamp paid on it, though relevant, are not conclusive on the question of construction.

In *Mussumat Oodey Koowur v Mussumat Ladoo*¹, the Privy Council held that a petition admitting that the petitioner had no claim to a certain estate did not operate as a conveyance of her subsequently acquired title, the petition having been filed in a pending suit by a petitioner having no present interest in the estate with a view to avoid an objection as to want of parties, and without receiving any consideration for the transfer of her future title. This case is an authority for the proposition that a bare admission in a document that the executant has no interest in a property made without any consideration cannot pass his subsequently acquired title to the property. In *Jadu Nath Poddar v. Rup Lal Poddar*², *Dharam Chand v Mauji Sahu*³, *Marak Lall v. Magoo Lall*⁴, *Mathuramohan Saha v. Ram Kumar Saha*⁵, Mookerjee, J. held that a deed of release or relinquishment could not operate as a conveyance and could at most be taken as an admission that the executant had no interest in the property. But those cases do not lay down a proposition of universal application that a deed styled a deed of release cannot operate as a conveyance. In *Hemendra Nath Mukerji v Kumar Nath Roy*⁶, by a registered deed called a deed of disclaimer the executants relinquished all their right, title and interest and claim in the properties in favour of the releasee upon the condition that the releasee would discharge certain debts and the executants would be under no liability to pay those debts. Though the deed was stamped only as a release and not with *ad valorem* stamp, Maclean, C J., held that on its true construction it was a transfer. We think that a registered instrument styled a release deed releasing the right, title and interest of executant in any property in favour of the releasee for valuable consideration may operate as a conveyance, if the document clearly discloses an intention to effect a transfer. In the instant case, Exhibit B-2 clearly discloses an intention to transfer all the rights of Baithan to defendants 1 to 5, and though the word "surrender" is used and though the deed is styled a release deed, it operates as an assignment

In view of this finding, it must follow that the kanom rights under Exhibit A-3 were duly vested in defendants 1 to 5, and they became the kanomdars, and consequently, they are protected from eviction under the Kerala Land Reforms Act, 1963.

1. (1870) 13 M I A. 585

2. (1906) I.L.R. 33 Cal 967, 983-984.

3. (1912) 16 C.L.J. 436.

4. (1915) 22 C.L.J. 380

5. (1915) 20 G.W.N. 370, 378.

6. 12 G.W.N. 478.

In view of this conclusion, it is not necessary to consider whether Exhibit A-8 operated as an assignment of Koran's leasehold rights in respect of items 3, 4 and 5 of the suit properties in favour of Abubacker and whether Exhibit A-10 operated as a sub-lease by Abubacker to Raman.

In the result, the appeal is dismissed. In all the circumstances of the case, we direct that there will be no order as to costs of this appeal.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND R. S. BACHAWAT, JJ.

Bhimaji Shankar Kulkarni

.. *Appellant**

v.

Dundappa Vithappa Udupudi and another

.. *Respondents.*

Bombay Tenancy and Agricultural Lands Act (LXVII of 1948), sections 70 and 85-A—Scope—Landowner's suit for possession claiming that defendant was mortgagee—Defendant contending that he was a tenant or a protected tenant or permanent tenant—Civil Court has no jurisdiction to decide the issue and must refer it to the Mamlatdar.

The Mamlatdar has no jurisdiction to try a suit by a landowner for recovery of possession of agricultural lands from a trespasser or from a mortgagee on redemption of a mortgage and the Civil Court has jurisdiction to entertain such a suit, but if the defendant to the suit pleads that he is a tenant or a protected tenant or a permanent tenant and an issue arises whether he is such a tenant, the Court must refer the issue to the Mamlatdar for determination, and must stay the suit pending such determination, and after the Mamlatdar has decided the issue, the Court may dispose of the suit in the light of decision of the Mamlatdar.

Section 85-A of Bombay Act LXVII of 1948 was introduced by Bombay Act XIII of 1956 which came into force on 23rd March, 1956, during the pendency of the second Appeal in the instant case and the suit out of which the appeal arose was governed by the law as it stood before the introduction of section 85-A. But the law was the same as laid by *Dhondi Tukaram v. Hari Dadu*, 1. L. R. 1953 Bom 969 which the Bombay Legislature approved of and gave effect to by introducing section 85-A. Even independently of section 85-A and under the law as it stood before section 85-A came into force, the Courts below were bound to refer to the mamlatdar the decision of the issue whether the defendant was a tenant.

Appeal by Special Leave from the Judgment and Decree, dated 7th December, 1959, of the Mysore High Court in Second Appeal (B) No. 184 of 1956.

S. G. Patwardhan, Senior Advocate (*S. N. Prasad*, Advocate and *J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant

R. Gopalakrishnan, Advocate, for Respondents.

The Judgment of the Court was delivered by

Bachawat, J.—On 19th April, 1951, the plaintiff-appellant instituted a suit in the Court of the Second Joint Civil Judge, Junior Division at Bagalkot, for possession of the suit properties on redemption of a mortgage and the taking of accounts on the allegation that defendant No. 1 was the usufructuary mortgagee under a mortgage deed, dated 28th June, 1945 (Exhibit 43). The defendants pleaded that the transaction of 28th June, 1945, was an advance lease and not a mortgage, and they were 'protected tenants' within the meaning of the Bombay Tenancy and Agricultural Lands Act, 1948 (LXVII of 1948) hereinafter referred to as the Act. On 4th March, 1953, the trial Court passed the following decree :

"10. (A) The deed Exhibit 43 is a composite document comprising of a mortgage and a lease. On taking accounts of the mortgage debt, it is found that plaintiff owed nothing to the defendants on the date of suit. The mortgage stands fully redeemed."

(b) The plaintiff is at liberty to seek his remedy for possession of the suit lands in the Revenue Courts.

(c) The plaintiff shall recover half the costs of the suit from the defendants and the defendants shall bear their own."

On 15th April, 1953, the plaintiff filed an appeal in the Court of the Assistant Judge at Bijapur, and the defendants filed cross-objections. On 5th July, 1955, the first appellate Court held that the Civil Court had no jurisdiction to determine whether defendant No. 1 was a mortgagee in possession or a tenant, and passed the following decree :

"The appeal is partly allowed. The decree of the learned trial Judge that nothing is due by plaintiff to the defendants under the transaction (Exhibit 43) at the date of the suit and the plaintiff is at liberty to seek his remedy for possession of the suit 'and in Revenue Court is confirmed. The rest of the decree namely that the document (Exhibit 43) is a composite document showing a mortgage and a lease and about costs is set aside. Instead it is directed that the record and proceedings should go back to the Trial Court who should give three months' time to the plaintiff after record and proceedings reach it for filing proper proceedings in the Tenancy Court for determining as to whether defendant 1 is a tenant. If the plaintiff does not institute those proceedings within the time allowed by the Trial Court, then the suit of the plaintiff for possession etc., should be dismissed ordering the parties to bear their own costs. If the proceedings are instituted by the plaintiff in the Tenancy Court, then the Trial Court should await the final decision of the said Tribunal. In case it is held by the Tenancy Court that the defendant 1 is not a tenant, then the Trial Court should proceed to pass a decree for possession of the suit lands from the defendants to the plaintiff and should order inquiry into mesne profits from the date of suit until delivery of possession and should reconsider the question of costs between the parties to the suit."

On 1st October, 1955, the plaintiff filed a second appeal in the High Court of Mysore. On 7th December, 1959, the High Court dismissed the second appeal. The High Court held :

"The lower Appellate Court having come to the conclusion that it has got no jurisdiction to interpret this document, should not have taken the accounts, treating the document as a mortgage. Therefore, I set aside that finding of the Assistant Judge. I confirm the finding of the Assistant Judge that the Civil Court has got no jurisdiction to interpret the document, Exhibit 43 as to whether it is a mortgage or a lease. It is, therefore, directed that the record should go back to the Trial Court who should refer the issue to the Mamlatdar as to whether the defendant is a lessee under Exhibit 43, dated 28th June, 1945, and in case it is held that the defendant is not a tenant then the Trial Court will proceed to decide the suit on merits. If it is held that the defendant is a lessee and therefore, a tenant, then the suit will be dismissed. Consequently, the appeal fails and is dismissed with costs."

Subsequent petitions by the plaintiff for review of this decree and for leave to file a Letters Patent Appeal were dismissed on 14th April, 1960. The plaintiff now appeals to this Court by Special Leave.

On behalf of the appellant, Mr. Patwardhan contended that the jurisdiction of a Civil Court depends upon the allegations made in the plaint, the Civil Court has full jurisdiction to try a suit for recovery of possession of agricultural lands on redemption of a mortgage and the Mamlatdar has no jurisdiction to try such a suit, the plea in the written statement that the defendants were protected tenants did not oust the jurisdiction of the Civil Court to try the suit and the Civil Court should have tried and decided the incidental issue whether the defendants were mortgagees or protected tenants, instead of referring the issue to the Mamlatdar. On behalf of the respondents, Mr. Gopalakrishnan disputed these contentions, and contended that the High Court rightly referred the issue for the decision of the Mamlatdar.

The suit lands are agricultural lands within the meaning of the Bombay Tenancy and Agricultural Lands Act, 1948. The Act was passed with a view to amend the law relating to tenancies of agricultural lands and to make certain other provisions in regard to those lands. 'Land' as defined in section 2 (8) of the Act covers land used for agricultural purposes including the site of dwelling houses occupied by agriculturists for the purposes *inter alia* of section 29. Section 2 (10) (A), 4 and 4-A define "permanent tenants," "tenants" and "protected tenants" respectively. Section 29 (2) provides that no landlord shall obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar, and for obtaining such order, he must make an application in the prescribed form

within a certain time. By section 29 (4), the landlord taking possession of any land or dwelling house except in accordance with the provisions of sub-section (2), is liable to forfeiture of crops, penalties and costs. Section 70 (b) provides that for the purposes of the Act, one of the duties and functions to be performed by the Mamlatdar is "to decide whether a person is a tenant or a protected tenant or a permanent tenant." Section 85 (1) provides that no Civil Court shall have jurisdiction to settle, decide or deal with any question which is by the Act required to be settled, decided or dealt with by the Mamlatdar. Section 85-A reads :

"85-A (1) If any suit instituted in any Civil Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act (hereinafter referred to as the competent authority) the Civil Court shall stay the suit and refer "such issues" to such competent authority for determination.

(2) On receipt of such reference from the Civil Court, the competent authority shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court and such Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

Explanation.—For the purpose of this section a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdar's Courts Act, 1906."

With regard to suits and proceedings by a landowner for possession of agricultural lands, the combined effect of sections 29, 70, 85 and 85-A of the Act is as follows : The Mamlatdar has exclusive jurisdiction to entertain an application by a landlord for possession of agricultural lands against a tenant, and the Civil Court has no jurisdiction to entertain and try a suit by a landlord against a tenant for possession of agricultural lands. The Mamlatdar has no jurisdiction to try a suit by a landowner for recovery of possession of agricultural lands from a trespasser or from a mortgagee on redemption of a mortgage, and the Civil Court has jurisdiction to entertain such a suit ; but if the defendant to the suit pleads that he is a tenant or a protected tenant or a permanent tenant and an issue arises whether he is such a tenant, the Court must refer the issue to the Mamlatdar for determination, and must stay the suit pending such determination, and after the Mamlatdar has decided the issue, the Court may dispose of the suit in the light of the decision of the Mamlatdar.

Section 85-A was introduced by Bombay Act XIII of 1956, which came into force on 23rd March, 1956, during the pendency of the Second Appeal in this case. The suit out of which this appeal arises was governed by the law as it stood before the introduction of section 85-A. But independently of section 85-A and before it came into force, the Bombay High Court in *Dhondi Tukaram v. Hari Dadu*¹ held that the effect of sections 70 (b) and 85 read in the light of the other provisions of the Act was that if in a suit filed against the defendant on the footing that he is a trespasser he raises the plea that he is a tenant or a protected tenant the Civil Court had no jurisdiction to deal with the plea, and the proper procedure was to refer the issue to the Mamlatdar for his decision and not to dismiss the suit straightaway. The Court observed :

"Therefore, we hold that in a suit filed against the defendant on the footing that he is a trespasser if he raises the plea that he is a tenant or a protected tenant, the Civil Court would have no jurisdiction to deal with that plea. We would, however, like to add that in all such cases where the Civil Court cannot entertain the plea and accepts the objection that it has no jurisdiction to try it, it should not proceed to dismiss the suit straightaway. We think that the proper procedure to adopt in such cases would be to direct the party who raises such a plea to obtain a decision from the Mamlatdar within a reasonable time. If the decision of the Mamlatdar is in favour of the party raising the plea, the suit for possession would have to be dismissed, because it would not be open to the Civil Court to give any relief to the landlord by way of possession of the agricultural land. If, on the other hand, the Mamlatdar rejects the plea raised under the Tenancy Act, the Civil Court would be entitled to deal with the dispute on the footing that the defendant is a trespasser."

In *Dhondi Tukaram's case*¹, the Court expressed the hope that the Legislature would make suitable amendments in the Act. The Bombay Legislature approved of the decision, and gave effect to it by introducing section 85-A by the amending Bombay Act XIII of 1956. Section 85-A proceeds upon the assumption that

though the Civil Court has otherwise jurisdiction to try a suit, it will have no jurisdiction to try an issue arising in the suit, if the issue is required to be settled, decided or dealt with by the Mamlatdar or other competent authority under the Act, and on that assumption, section 85-A provides for suitable machinery for reference of the issue to the Mamlatdar for his decision. Now, the Mamlatdar has jurisdiction under section 70 to decide the several issues specified therein "for the purposes of this Act," and before the introduction of section 85-A, it was a debatable point whether the expression "for the purposes of this Act" meant that the Mamlatdar had jurisdiction to decide those issues only in some proceeding before him under some specific provision of the Act, or whether he had jurisdiction to decide those issues even though they arose for decision in a suit properly cognisable by a Civil Court, so that the jurisdiction of the Civil Court to try those issues in the suit was taken away by section 85 read with section 70. *Dhondi Tukaram's case*¹ settled the point, and held that the Mamlatdar had exclusive jurisdiction to decide those issues even though they arose for decision in a suit properly cognisable by a Civil Court. The result was somewhat startling, for normally the Civil Court has jurisdiction to try all the issues arising in a suit properly cognisable by it. But having regard to the fact that the Bombay Legislature approved of *Dhondi Tukaram's case*¹ and gave effect to it by introducing section 85-A, we must hold that the decision correctly interpreted the law as it stood before the enactment of section 85-A. It follows that independently of section 85-A and under the law as it stood before section 85-A came into force, the Courts below were bound to refer to the Mamlatdar the decision of the issue whether the defendant is a tenant.

In *Mudugere Rangaiah v. M. Rangaiah*², the plaintiff sued for a declaration that he is the kadim tenant in the suit land and prayed for a permanent injunction restraining the defendant from interfering with his possession. Both the plaintiff and the defendant claimed to be tenants under the same landlord. The defendant contended that the suit was not maintainable in a civil Court in view of section 46 of the Mysore Tenancy Act (XIII of 1952). The Mysore High Court held that the jurisdiction of the Amildar is limited to cases arising by or under the Mysore Tenancy Act, and the decisions that he is required to give under section 32 of the Act were "for the purposes of the Act" and the aforesaid suit did not arise under any of the provisions of the Act and the Civil Court had therefore, the jurisdiction to decide all the points in dispute in the suit including the question of tenancy and no provision in the Act laid down that a Civil Court was not entitled to try civil proceedings involving the determination of any question falling within section 32 of the Act, though the Amildar was the competent authority to settle, decide and deal with those questions, had they arisen in proceedings under the Act. Sections 32 and 46 of the Mysore Act are similar to sections 70 and 85 of the Bombay Act, but there are many points of distinction between the scheme and legislative history of the Mysore Act and those of the Bombay Act. The Mysore High Court considered *Dhondi Tukaram's case*¹, and also noted some of the points of distinction between the two Acts. In the instant case, the question of interpretation of sections 32, 46 and other provisions of the Mysore Act does not arise, and we express no opinion on it. We must not be taken to express any opinion one way or the other the correctness or otherwise of the decision in *Mudugere Rangaiah's case*².

Mr. Patwardhan also contended that in the Second Appeal preferred by the plaintiff the High Court had no jurisdiction to set aside the finding of the first appellate Court given in favour of the appellant, namely, the finding that "nothing is due by the plaintiff to the defendants under the transaction, Exhibit 43." There is no substance in this contention. The first appellate Court recorded inconsistent findings. Having held that the civil Court had no jurisdiction to determine whether defendant No. 1 was a mortgagee in possession or a tenant, the lower appellate Court should have stayed the suit pending decision of that question by the Mamlatdar, and until such a decision was given, the Court could not proceed

1. I.L.R. (1953) Bom 969. 2. I.L.R. (1959) Mysore 420.

on the footing that the transaction evidenced by Exhibit 43 was a mortgage and the defendant No. 1 was a mortgagee and hold that nothing was due by the plaintiff to the defendants under the transaction. The High Court had ample power to correct this error and to set aside this inconsistent finding in an appeal filed by the plaintiff, though the defendants had filed no appeal or cross-objections.

In the result, the appeal is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, J. C. SHAH AND J. R. MUDHOLKAR, JJ.

Kumar Harish Chandra Singh Deo and another

.. *Appellants**

v.

Bansidhar Mohanty and others

.. *Respondents.*

Transfer of Property Act (IV of 1882), sections 3 and 59—"Attested"—Person who really lends money on mortgage executed in name of benamidar—If can attest the deed—Right of the beneficial owner to sue on mortgage.

No doubt, neither the definition of "attested" nor section 59 of the Transfer of Property Act, debars a party to a mortgage deed from attesting it. It must however be borne in mind that the law requires that the testimony of parties to a document cannot dispense with the necessity of examining at least one attesting witness to prove the execution of the deed. Inferentially, therefore, it debars a party from attesting a document which is required by law to be attested

Where, however, a person is not a party to the deed there is no prohibition in law to the proof by such person of the execution of the document. A person who has lent money for securing the payment of which a mortgage deed was executed by the mortgagor in favour of a benamidar is competent to attest the deed as he was not a party to the deed though a party to the transaction.

The actual lender of the money is entitled to file a suit to enforce the mortgage and it cannot be said that the benamidar alone is entitled to sue on the mortgage.

Appeal from the Judgment and Decree dated 26th July, 1960, of the Orissa High Court in First Appeal No. 6 of 1954.

Sarjoo Prasad, Senior Advocate (*S. Murty* and *B. P. Maheswari*, Advocates, with him), for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (*R. Gopalakrishnan*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Mudholkar, J.—Two questions are raised before us in this appeal from the judgment of the Orissa High Court. One is whether the mortgage deed upon which the suit of respondent No. 1 was based was validly attested. The other is whether the respondent No. 1 was entitled to institute the suit.

The mortgage deed in question was executed by the appellant in favour of Jagannath Debata, respondent No. 2 on 30th April, 1945, for a consideration of Rs. 15,000. The appellant undertook to repay the amount advanced together with interest within one year from the execution of the deed. The appellant, however, failed to do so. Respondent No. 1 therefore instituted the suit out of which this appeal arises.

According to respondent No. 1 though the money was advanced by him to the appellant he obtained the deed in the name of the second respondent Jagannath Debata because he himself and the appellant were close friends and he felt it embarrassing to ask the appellant to pay interest on the money advanced by him. As the consideration for the mortgage deed proceeded from him he claimed the right to sue upon the deed. He, however, joined Jagannath Debata as the third defendant to the suit. He also joined Dr. Jyotsna Dei as second defendant because

she is the transferee of the mortgaged property—which consists of a house, from the appellant whose wife she is. This lady however remained *ex parte*. The appellant denied the claim on various grounds but we are only concerned with two upon which arguments were addressed to us. Those are the grounds which we have set out at the beginning of the judgment. The third defendant Jagannath Debata disputed the right of respondent No. 1 to institute the suit and claimed that it was he who had advanced the consideration. His claim was, however, rejected by the trial Court and he has remained content with the decree passed by the trial Court in favour of respondent No. 1. The trial Court decreed the suit of respondent No. 1 with costs. Against that decree the appellant alone preferred an appeal before the High Court. The contentions raised by the appellant before us were also raised by him before the High Court but were rejected by it.

In our opinion there is no substance in either of the contentions urged on behalf of the appellant. It is no doubt true that there were only two attesting witnesses to the mortgage deed, one of whom was respondent No. 1, that is, the lender himself. Section 59 of the Transfer of Property Act, which, amongst other things, provides that a mortgage deed shall be attested by at least two witnesses does not in terms debar the lender of money from attesting the deed. The word “attested” has been defined thus in section 3 of the Transfer of Property Act :

“‘attested’ in relation to an instrument means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant, but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary ”

This definition is similar to that contained in the Indian Succession Act. It will be seen that it also does not preclude in terms the lender of money from attesting a mortgage deed under which the money was lent. No other provision of law has been brought to our notice which debars the lender of money from attesting the deed which evidences the transaction whereunder the money was lent. Learned Counsel, however, referred us to some decisions of the High Courts in India. These are *Peary Mohan Maiti and others v. Sreenath Chandra*¹; *Sarur Jugar Begum v. Barada Kanta*², and *Gomathi Ammal v. V. S. M. Krishna Iyer*³. In all these cases it has been held that a party to a document which is required by law to be attested is not competent to attest the document. In taking this view reliance has been placed upon the observations of Lord Selborne, L.C., in *Seal v. Claridge*⁴ :

“It (i.e., the attestation) implies the presence of some person, who stands by but is not a party to the transaction.”

The object of attestation is to protect the executant from being required to execute a document by the other party thereto by force, fraud or undue influence. No doubt, neither the definition of “attested” nor section 59 of the Transfer of Property Act debars a party to a mortgage deed from attesting it. It must, however, be borne in mind that the law requires that the testimony of parties to a document cannot dispense with the necessity of examining at least one attesting witness to prove the execution of the deed. Inferentially, therefore, it debars a party from attesting a document which is required by law to be attested. Where, however, a person is not a party to the deed there is no prohibition in law to the proof of the execution of the document by that person. It would follow, therefore, that the ground on which the rule laid down in English cases and followed in India would not be available against a person who has lent money for securing the payment of which a mortgage deed was executed by the mortgagor but who is not a party to that deed. Indeed it has been so held by the Bombay High Court in *Balu Ravi Gharat v. Gopal Gangadhar Dhabu*⁵ and by the late Chief Court of Oudh in *Durga Din and others v. Suraj Bakhsh*⁶.

1. 14 C.W.N. 1046.

2. (1910) 1 L.R. 37 Cal. 526.

3. (1953) 2 M.L.J. 303 : A.I.R. 1954 Mad.

126.

4. (1881) L.R. 7 Q.B.D. 516.

5. 12 I.C. 531

6. (1931) 1 L.R. 7 Lucknow 41 (F.B.).

In the first of these cases an argument similar to the one advanced before us was addressed before the Bombay High Court. Repelling it the Court observed:

"In *Seal v. Glaridge*¹ much relied upon by the appellant's pleader the old case of *Swire v. Bell*² in which the obsolete rule was pushed to its farthest extent, was cited to the Court but Lord Selborne in delivering judgment said: 'What is the meaning of attestation, apart from the Bills of Sale Act, 1878? The word implies the presence of some person who stands by but is not a party to the transaction.' He then referred to *Freshfield v. Reed*³ and said: 'It follows from that case that the party to an instrument cannot attest it.' Again in *Wickham v. Margus of Bath*⁴, the remarks of the Master of the Rolls imply that if the plaintiffs Dawe and Wickham had not executed the deed as parties but had only signed with the intention of attesting, the provision of the statute requiring two attesting witnesses would have been satisfied.

A distinction was thus drawn in this case between a person who is a party to a deed and a person who, though not a party to the deed, is a party to the transaction and it was said that the latter was not incompetent to attest the deed. This decision was followed by the Chief Court of Oudh. We agree with the view taken by the Bombay High Court.

As regards the second question a number of High Courts in India had taken the view that a *benamidar* could not maintain a suit for the recovery of property standing in his name, beneficial interest in which was in someone else. Benami transactions are not frowned upon in India but on the other hand they are recognised. Indeed section 84 of the Indian Trusts Act, 1882 gives recognition to such transactions. Dealing with such transactions Sir George Farwell has observed in *Bilas Munwar v. Desraj Ranyit Singh*⁵:

"It is quite unobjectionable and has a curious resemblance to the doctrine of our English law, that the trust of the legal estate result to the man who pays the purchase money, and this again follows the analogy of our common law, that where a feoffment is made without consideration the use results to the feoffor."

It must follow from this that the beneficial owner of property standing in the name of another must necessarily be entitled to institute a suit with respect to it or with respect to the enforcement of a right concerning the property of a co-sharer. It will follow that a person who takes benefit under the transaction or who provides consideration for a transaction is entitled to maintain a suit concerning the transaction. Thus where a transaction is a mortgage, the actual lender of money is entitled to sue upon it. Indeed, till the decision of the Privy Council in *Gur Narayan and others v. Sheo Lal Singh and others*⁶, the right of a *benamidar* to sue upon a transaction which is only ostensibly in his favour was not recognised by several Courts in India. Relying upon this decision it was contended before us on behalf of the appellant that in view of this decision it must be held that it is the *benamidar* alone who could maintain a suit but not the beneficial owner. That, however, is not what the Privy Council decided. Indeed, that was never a question which arose for consideration before the Privy Council. Apart from that on principle the real beneficiary under a transaction cannot be disentitled to enforce a right arising thereunder.

In this view we uphold the decree of the High Court and dismiss the appeal with costs.

K.S.

Appeal dismissed.

1. (1881) L.R. 7 Q.B.D. 516.

2. (1793) 5 T.R. 371.

8. (1842) 9 M. & W. 404.

4. (1865) L.R. 1 Eq. at p. 25.

5. (1915) 29 M.L.J. 335. L.R. 42 I.A. 202, 205.

6. (1918) 36 M.L.J. 68 : L.R. 46 I.A. 1.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND R. S. BACHAWAT, JJ.
 Bhanwar Lal and another

.. Appellants*

v.

Regional Settlement Commissioner, Jaipur *cum*, Custodian
 Evacuee Property and others

.. Respondents.

Administration of Evacuee Property Act (XXXI of 1950), section 7 (1)—Notice under—Mortgagors migrating to Pakistan—Mortgagees deed—Notice to show cause why land be not declared evacuee property affixed at conspicuous place in village—Order declaring the property evacuee property—Effect—Heirs and tenants of mortgagees who were in possession of the property—If action can be taken against before separation of interest under (Evacuee Interest Separation) Act (LXIV of 1951).

The Custodian can form his opinion about any property having become evacuee property on the basis of information available to him. He can issue notice to persons interested also on the basis of information available to him. He is not expected to hold a general inquiry of the persons interested in the alleged evacuee property.

In the instant case the mortgagors had migrated to Pakistan and the Custodian gave notice to the mortgagees (whose names were shown in village records). But the notice was ineffective as the mortgagees were then dead. The order declaring the property evacuee property had only the effect of declaring the equity of redemption in the property to be evacuee property and it could not affect the interests of the owner of mortgagee rights. The Custodian holds the property subject to the mortgagee rights of the heirs of the mortgagee.

So long as proper action under the Evacuee Interest (Separation) Act is not taken to separate the interest of the evacuees and the mortgagee's heirs the Custodian cannot take any action against the mortgagees heirs or tenants who were said to be in possession of the property in suit.

Appeal by Special Leave from the Judgment and Order dated 7th April, 1964, of the Rajasthan High Court in D.B. Writ Petition No. 192 of 1960.

B. R. L. Iyengar, S. K. Mehta and K. L. Mehta, Advocates, for Appellants.

D. R. Prem, Senior Advocate (*B. R. G. K. Achar*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—Ibrahim and Khurshed, brothers, sons of Panch Ali, Isak and Baggu, sons of Jawaye, owned Khasra No. 26 measuring 20 bighas, at village Alipore, Tehsil Hanumangarh. They migrated to Pakistan. The Assistant Custodian of Evacuee Property, Hanumangarh, issued notice under section 7 (1) of the Administration of Evacuee Property Act, 1950 (XXXI of 1950) hereinafter called the Act, to these persons and also to Hazari, son of Chuni and Magha, son of Kana, stating therein that Ibrahim and others had gone to Pakistan and that Hazari and Magha were in illegal possession of the land. They were all required to show cause why the land be not declared evacuee property. The notice was affixed at a conspicuous place in village Alipore. The notice could not be served on Hazari and Magha as they had died long before the issue of notice in 1955.

No objections were filed and on 7th April, 1955, the Assistant Custodian declared Ibrahim, Khurshed, Isak and Baggu evacuees and the aforesaid property evacuee property. Bhanwar Lal, son of Hazari and Rati Ram, grandson of Magha, filed a petition under Article 226 of the Constitution in the Rajasthan High Court for the quashing of the order dated 7th April, 1955, and for restraining the Regional Settlement Commissioner, Jaipur, the Managing Officer of acquired Evacuee Property, Ganganagar, the Tehsildar, Hanumangarh, from interfering with their possession over the property declared to be evacuee property. They alleged that one Panch Mohammed, father of Ibrahim and Khurshed, had mortgaged this property to Hazari and Magha in 1931, that the mortgagees had been in possession of

the property, that they did not get any notice of the proceedings taken by the Assistant Custodian and were informed of his order in 1959 by their tenants in the land in suit when the allottees of the land were taking steps to recover possession. The writ petition was dismissed by the High Court which held that the issue of notice to Hazar and Magha was sufficient compliance with the requirements of sub-section (1) of section 7 of the Act as the Custodian had not to make any preliminary enquiry about the persons who might be interested in the property of the alleged evacuee. It is against this order that Bhanwar Lal and Rati Ram have filed this appeal by Special Leave.

Section 7 (1) of the Act reads :

"Where the Custodian is of opinion that any property is evacuee property within the meaning of this Act, he may, after causing notice thereof to be given in such manner as may be prescribed to the persons interested, and after holding such inquiry into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property."

The Custodian can form his opinion about any property having become evacuee property on the basis of information available to him. It has been so held in *Abdul Hakim Khan v. The Regional Settlement Commissioner*¹. He can issue notice to the persons interested also on the basis of information available to him. He is not expected to hold a general inquiry of the persons interested in the alleged evacuee property. In the present case it appears that the village records about the land in suit which is agricultural, recorded the names of Hazari and Magha as mortgagees and that the Assistant Custodian could consider them to be the persons interested. He could have had no information whether these mortgagees who resided at some other place were alive or not. He complied with the requirements of sub-section (1) of section 7 to give a notice to Hazari and Magha. The notice however was ineffective and not good as Hazari and Magha had died long before. The question then arises whether the further proceedings on the basis of this notice could affect the interests of the mortgagees.

The interest of Ibrahim and others, the evacuees of the property in suit which was under mortgage, consisted of the equity of redemption in the property. It is this interest of theirs which could be declared evacuee property and the order of the Assistant Custodian dated 7th April, 1955, declaring the aforesaid property to be evacuee property, really amounts to an order declaring the right of Ibrahim and others in the equity of redemption of evacuee property. The order cannot affect the mortgagee rights as Ibrahim and others had no interest in the mortgagee rights.

It follows that the impugned order does not affect the rights of the appellants if any as mortgagees. The non-issue of the notice to the appellants therefore is of no consequence as the order subsequently passed without the issue of the notice to them does not affect their interest.

Reference in this connection may again be made to *Abdul Hakim Khan's case*¹. In that case a number of persons had shares in certain property. Some of them migrated to Pakistan. The notice under section 7 (1) was issued to one of those persons who had not migrated to Pakistan. The Custodian declared the property of those who had migrated to be evacuee property and specified their share in the property. The other co-sharers except the one to whom the notice was issued, challenged the validity of the order passed under section 11 of the Evacuee Interest (Separation) Act, 1951 (LIV of 1951), vesting the entire property in the Custodian. This Court held that the objectors could not challenge the validity of the order under section 7 of the Act as it did not affect their rights in the property. Similarly it can be said that the appellants in this case cannot challenge the validity of the proceedings on the notice issued by the Assistant Custodian and the order of the Assistant Custodian declaring the property in suit to be evacuee property when that order does not affect the mortgagee rights of the appellants.

By virtue of the order dated 7th April, 1955, the rights of the evacuees in the property in suit vest in the Custodian and those rights, as stated earlier, consist of

1. (1963) 1 S.C.J. 343 : (1962) 1 S.G.R. 531 : A.I.R. 1961 S.G. 1391.

the rights of equity of redemption. This means that the Custodian holds the property subject to the mortgagee rights, if any, of the appellants.

It has been conceded by Mr. Prem appearing for the respondents, that no action has been taken under the Evacuee Interest (Separation) Act, 1951. Section 10 of this Act empowers the competent officer to take all necessary measures for the purpose of separating the interest of the evacuees from those of the claimants in any composite property which *inter alia*, means any property which or in which an interest has been declared to be evacuee property or has vested in the Custodian under the Act and in which the interest of the evacuee is subject to mortgage in any form in favour of a person not being an evacuee. It is only after such separation of the interests of the evacuee and the claimants in the composite property that the evacuee interest gets vested in the Custodian free from all encumbrances. It follows that so long as proper action under the Evacuee Interest (Separation) Act is not taken to separate the interest of the evacuees and the appellants who claim to be mortgagees, the Custodian cannot take any action against the appellants or their tenants who are said to be in possession of the property in suit.

The result then is that we dismiss the appeal and confirm the order of the Court below with respect to the validity of the order of the Assistant Custodian dated 7th April, 1955. We allow the appeal with respect to the prayer for restraining the Regional Settlement Commissioner and others, respondents 1 to 3, from interfering with the possession of the appellants or their tenants. We order the parties to bear their own costs throughout.

K. S.

Appeal allowed in part.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

Rajeswar Prasad Misra

.. *Appellant**

v.

The State of West Bengal and another

.. *Respondents.*

Criminal Procedure Code (V of 1898), sections 428 and 417 (3)—Appeal against acquittal—High Court if can order taking of fresh evidence.

Section 428 of the Criminal Procedure Code applies to an appeal under section 417 (3) of the Code. In Criminal jurisdiction the guiding principle is that a person must not be vexed twice for the same offence. That principle is embodied in section 403 of the Criminal Procedure Code and is now included as a Fundamental Right in Article 20 (2) of the Constitution. The protection however is only so long as the conviction or acquittal stands. But the Code contemplates that a retrial may be ordered after setting aside the conviction or acquittal (as the case may be) if the trial already held is found to be unsatisfactory or leads to a failure of justice. In the same way the Code gives a power to the appellate Court to take additional evidence, which for reasons to be recorded, it considers necessary. The Code thus gives power to the appellate Court to order one or the other as the circumstances may require leaving a wide discretion to it to deal appropriately with different cases. Since a wide discretion is conferred on appellate Courts, the limits of that Court's jurisdiction must obviously be dictated by the exigency of the situation and fairplay and good sense appear to be the only safe guides. The power to take additional evidence must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise. In any case it is necessary only to see whether the discretionary power, which exists, was properly exercised.

[In the instant case it was held that the High Court acted within the powers conferred by the Code in taking additional evidence.]

Appeal by Special Leave from the Judgment and Order dated 5th September, 1962, of the Calcutta High Court in Criminal Appeal No. 295 of 1960.

P. K. Chakravarty, Advocate, for Appellant.

Sarjoo Prasad, Senior Advocate (*E. Udayarathnam* and *R. C. Prasad*, Advocates, with him), for Respondent No. 2.

The Judgment of the Court was delivered by

Hidayatullah, J.—The appellant Rajeswar Prasad Misra, who has been convicted under section 408 of the Indian Penal Code on three counts and sentenced in the aggregate to suffer rigorous imprisonment for one year and to pay a fine of Rs. 2,000 (in default 6 months' further rigorous imprisonment), was a travelling salesman of Messrs. Dabur (Dr. S. K. Burman) Private, Ltd. The area of his operation was the Suburbs of Calcutta and the Mill Area. His duty was to secure orders from Agents and to effect delivery of goods to them in the Company's vans. He was required to receive payments from the agents and to deposit the money with the cashier of the Company. The three charges on which he was tried and convicted were : on 10th and 19th February, 1958, he received, on behalf of the Company, sums of Rs. 300 and Rs. 240 respectively, from a firm Isaq & Sons and on 23rd May, 1958 a sum of Rs. 1,502 from Bombay Fancy Stores, but failed to deposit these sums with the cashier. A complaint was accordingly filed against him in the Court of the Chief Presidency Magistrate, Calcutta on 29th August, 1958. The charges were framed against him under section 408, Indian Penal Code, on 16th July, 1959. The prosecution proved the receipt of the money by him and his failure to deposit it with the cashier. His defence was that he had deposited the amount and that the case was started against him as a counter-blast to a dispute between him and V. D. Srivastava, sales supervisor, who had taken away certain documents from him and in respect of which he had filed a case against Srivastava, S. N. Mukerjee, General Manager, R. C. Gurman, Managing Director and others before the Police Magistrate, Alipore. On 17th August, 1959, the appellant served through Counsel on the complainant a notice to produce in Court on 20th August, 1959, the following documents :

- (a) Sale Book (Mill Area) for 1958.
- (b) Collection Register from 2nd January, 1958 up to 15th July, 1958.
- (c) Challans for the year 1958 as per parcel No. etc. (entered in the related sale books) of Agent Nos. 1026, 1185, 296, 1021 and 181.
- (d) Agency Ledger for the year 1958.
- (e) Staff Security Deposit Register.
- (f) Relevant register/statement showing accused's dues on account of commission earned on the basis of sales effected by him for the years 1957 and 1958.

The complainant's Counsel replied to the notice as follows :—

"Your request to produce certain books cannot be complied with for the objections noted against the items separately.

1. *Sale Book*—this book cannot be produced unless you specify either the agent or the parcel No. On furnishing particulars the relevant entries will be shown.
2. *Collection Register*—We have objection to the other salesman's collection being shown to you. As far as you client's returns are concerned they have been filed, if anything more relating to your client is necessary we will produce that on getting particulars
3. *Challans for the year 1958*—We have no objection to produce them for your inspection.
4. *Agency Ledger for 1958*—Please supply particulars—The number of agents must be furnished
5. *Staff Security Deposit Register*—This book cannot be produced for your inspection. Only an attested copy of the page showing security deposit by your client can be supplied
6. *Accused's commission account*—Will be produced. Please supply the particulars asked for so that the necessary papers may be produced for your inspection by 22nd August, 1959 "

* * * * *

The documents were not produced. In the cross-examination of some witnesses for the complainant a suggestion was made that these documents were withheld because they would have demonstrated that the appellant had deposited the money with the cashier. A. C. Burman (P.W. 7) was questioned and he replied as follows :—

“ * * * * * I know that defence wanted the production of Sale Book, Agency Ledger and the Register containing the commission of accused. The documents were not produced as it was not possible to produce the same without particulars. There are 20 Sale Books of 1958. It is not a fact that the books were not produced as they would show that the complaint is false.”

The appellant produced no evidence in rebuttal of the prosecution case. The Presidency Magistrate recorded a judgment of acquittal on 7th March, 1960. He was of opinion that the only question was whether the accused had deposited the amount with the cashier of the Company. He held that the complainant had not been able to disprove the claim of the accused (appellant) that he had made the deposit. The learned Magistrate pointed out that some of the documents which the accused (appellant) had asked for were not produced by the complainant and the benefit of the doubt ought to go to the accused (appellant).

The complainant then obtained Special Leave under section 417 (3) of the Code of Criminal Procedure from the High Court of Calcutta to appeal against the acquittal. The appeal was heard by S. K. Sen and A.C. Roy, JJ. On 28th June, 1962, the learned Judges ordered the production of the documents in question and the taking of additional oral evidence to prove the documents. The order is brief and it may be conveniently set out here :

“ After hearing the arguments on both sides it appears to be necessary to take certain additional documentary evidence for arriving at a just decision in the case. The documents in question are the agency ledgers for 1958 relating to the selling agents Md. Isaq & Sons and Bombay Fancy Stores ; and the collection book Part I of 1958 which supplements the collection book Part II which was marked as Exhibit 19. The Presidency Magistrate S. N. Sanyal or his successor Magistrate will please take the necessary evidence so that the above documents and registers are formally proved and allow the accused an opportunity to cross-examine the witnesses proving the documents, and then transmit the records with the registers and documents to this Court within a period of six weeks from the date ”

The complainants thereupon produced the documents as ordered and examined two witnesses in proof of the documents. The appeal was then heard and allowed and the acquittal of the appellant was set aside and he was convicted and sentenced as already stated. The High Court held that there was overwhelming evidence to prove the receipt of the three sums by the appellant and that the additional evidence demonstrated clearly that the money received by the appellant was not deposited with the cashier of the Company. The appellant has filed this appeal by Special Leave, and it is contended that the High Court acted beyond the jurisdiction conferred by section 428 of the Code of Criminal Procedure in receiving additional evidence which has enabled the prosecution to improve its case. This is the only point which was argued and which we need consider, because, if the evidence was rightly received, there is no doubt that the conclusion of the High Court on fact is correct.

The appellant strongly relies upon a decision of this Court reported in *Abinash Chandra Bose v. Bimal Krishna Sen and another*¹, and the respondents upon *Ukha Kolhe v. State of Maharashtra*², another case of this Court which is to be found in the same volume at page 1531. Both sides have referred us to many cases decided by the High Courts defining the powers of the appellate Court to take additional evidence. The appellant contends that additional evidence could not be taken in the appeal against the order of acquittal in the present case.

It may be stated at once that the Code does not make difference between the ambit of an appeal from a conviction and that of an appeal from an order of acquittal except that an appeal against a conviction is as of right and lies to Courts of different jurisdiction depending on the nature of sentence, the kind of trial and the Court in which it was held, whereas an appeal against an order of acquittal can only be made

1 (1964) 2 S.C.J. 285 (1964) M.L.J. (CrI) 488 : (1963) 3 S.C.R. 564. A.I.R. 1963 S.C. 316.
2. (1964) 1 S.C.R. 926; 65 Bom L.R. 793 : A.I.R. 1963 S.C. 1531.

to the High Court by the State Government or by a complainant, (where the case started on a complaint) with the Special Leave of the High Court. The matters on which an appeal under the Code is admissible are stated in section 418 and they are the same for the two kinds of appeals. Such appeals lie on a matter of fact as well as a matter of law (except in trials by Jury). The procedure for dealing with the two kinds of appeals is identical and the powers of appellate Courts in disposing of the appeals, though indicated separately in section 423 are in essence the same. Under that section the appellate Court (which means the High Court in an appeal against an order of acquittal) may—

“(a) in an appeal from an order of acquittal reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law ;

(b) in an appeal from a conviction (1) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding alter the nature of the sentence but, subject to the provisions of section 106, sub-section (3), not so as to enhance the same

* * * * *

Section 428 next provides :

“428. (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Sessions or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present, when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV as if it were an inquiry.”

It was at one time felt that the powers of the High Court were somewhat limited when dealing with an appeal against an order of acquittal but that was dispelled by the Judicial Committee in *Shoo Swarup and others v. King Emperor*¹, in a categorical pronouncement (later accepted by this Court in many cases) that :

“There is no foundation for the view apparently supported by the judgments of some Courts in India that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact except in cases in which the lower court has obstinately blundered or has ‘through incompetence, stupidity or perversity’ reached such distorted conclusions as to produce a positive miscarriage of justice, or has in some other way so conducted itself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result. Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses ; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses”

The appellant relies upon certain observations of this Court in the case of *Abinash Chandra Bose*². The accused in that case was prosecuted under section 409, Indian Penal Code, for misappropriating an amount belonging to his client who was the complainant. Prosecution was based upon a letter said to be written by him which he stated was a forgery. No expert was examined by the complainant and the accused was acquitted. The High Court set aside the acquittal and ordered a retrial. It was held by this Court that this was against “all well-established rules of criminal

¹ (1934) L R 61 I.A 338 : 67 M L J.

² (1964) 2 S.C.J. 285 : (1964) M.L.J. (Cr.) 488 : (1963) 3 S.G.R. 564 : A I.R. 1963 S.C. 316.

jurisprudence" that "an accused person should not be placed on trial for the same offence more than once, except in very exceptional circumstances." Holding that if the High Court did not think that "the appreciation of the evidence by the trial Court was so thoroughly erroneous as to be wholly unacceptable," "it should not have put the accused to the botheration and expense of a second trial simply because the prosecution did not adduce all the evidence that should and could have been brought before the Court of first instance" and which "it was nowhere suggested had been refused to be received." Mr. Chakravarti contends that there is no essential difference between the taking of fresh evidence under section 428 or the ordering of a retrial under section 423, that this evidence was always available and had in fact, been asked to be brought in at the trial but was not, and the prosecution should not have another chance whether by way of retrial or additional evidence. The other side contends that in *Ukha Kolhe's case*¹ the principles were restated exhaustively and that we should guide ourselves by the statement of the law laid down there. In that case there was a conviction of the accused under section 66 (b) of the Bombay Prohibition Act. The report of the Chemical Examiner proved the existence of alcohol in the sample of blood but there were many points in the evidence of experts, which remained unexplained and their examination was perfunctory. On appeal the conviction was set aside and a retrial was ordered. This Court in dealing with the order of retrial observed in the majority judgment :

"An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of Justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again....."

It was pointed out that the Sessions Judge could have taken recourse to the power conferred by section 428 and not ordered a retrial.

Section 428 occurs in Chapter XXXI which deals with appeals. It speaks of any appeal under that Chapter and the word 'any' means, every one of the appeals (no matter which) mentioned in the thirty-first Chapter of the Code. Section 417 (3) is in that Chapter and section 428 clearly applied to the appeal which was in the High Court. It only remains to determine the limits (if any) of the jurisdiction and power of the appellate Court (here the High Court) in ordering additional evidence and whether the limits so determined were exceeded by the High Court in the present case.

Mr. Chakravarti contends that the discretion under section 428 is subject to the same conditions as those in section 423 and which were laid down in *Abinash Chandra Bose's case*². He lays special emphasis on the condition that the prosecution should not be given a second chance to fill up the gaps in its case. He submits that this has been done here. Mr. Sarjoo Prasad on the other hand explains the *Abinash Chandra Bose's case*² with the aid of *Ukha Kolhe's case*¹ and submits that in the latter, this Court gave an exhaustive list of circumstances in which an order for retrial can be made and indicated that in cases falling outside those circumstances the appellate Court has a discretion to order additional evidence, if considered necessary.

These arguments disclose a tendency to read the observations of this Court as statutory enactments. No doubt, the law declared by this Court binds Courts in India but it should always be remembered that this Court does not enact. The two cases of this Court point out that in criminal jurisdiction the guiding principle is that a person must not be vexed twice for the same offence. That principle is embodied in section 403 of the Code and is now included as a Fundamental Right in Article 20 (2) of the Constitution. The protection, however, is only as long as the conviction or acquittal stands. But the Code contemplates that a retrial may

1. (1964) 1 S.C.R. 926: 65 Bom L.R. 793 :
A I. R. 1963 S.C.1531.

2. (1964) 2 S.C.J. 285 : (1964) M.L.J. (Cr1)
488. (1963) 3 S.C.R. 564: A.I.R. 1963 S.C.316.

be ordered after setting aside the conviction or acquittal (as the case may be) if the trial already held is found to be unsatisfactory or leads to a failure of justice. In the same way, the Code gives a power to the appellate Court to take additional evidence, which, for reasons to be recorded, it considers necessary. The Code thus gives power to the appellate Court to order one or the other as the circumstances may require leaving a wide discretion to it to deal appropriately with different cases. The two cases of this Court deal with situations in which a retrial was considered necessary by the appellate Court. In the case of *Abinash Chandra Bose*,¹ this Court held that the order for retrial was not justified. In *Ukha Kolhe's case*² too the order for retrial was considered unnecessary because the end could have been achieved equally well by taking additional evidence. This Court mentioned, by way of illustration, some of the circumstances which frequently occur and in which retrial may properly be ordered. It is not to be imagined that the list there given was exhaustive or that this Court was making a clean cut between those cases where retrial rather than the taking of additional evidence was the proper course. It is easy to contemplate other circumstances where retrial may be necessary as for example where a conviction or an acquittal was obtained by fraud, or a trial for a wrong offence was held or abettors were tried as principal offenders and *vice versa*. Many other instances can be imagined. The Legislature has not chosen to indicate the limits of the power and this Court must not be understood to have laid them down. Cases may arise where either of the two courses may appear equally appropriate. Since a wide discretion is conferred on appellate Courts, the limits of that Courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.

Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if it was possible) to list here. We do not propose to do what the Legislature has refrained from doing, namely, to control discretion of the appellate Court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise. Commentaries upon the Code are full of cases in which the powers under section 428 were exercised. We were cited a fair number at the hearing. Some of the decisions suffer from the sin of generalization and some others from that of arguing from analogy. The facts in the cited cases are so different that it would be futile to embark upon their examination. We might have attempted this, if we could see some useful purpose but we see none. We would be right in assuming the existence of a discretionary power in the High Court and all that we consider necessary is to see whether the discretion was properly exercised.

The appellant here had received three sums from the agents and the allegation was that he had misappropriated the amount. During his trial he asked for certain documents but for some reason, into which it is hardly necessary to go, they were not brought. There was oral evidence tending to show that the money was not credited with the cashier of the Company. The Magistrate was not inclined to

¹ (1964) 2 S.C.J. 285; (1964) M.L.J. (Cr.) : 2 (1964) 1 S.C.R. 926 65 Bom.L.R. 793 : (1963) 3 S.C.R. 564; A.I.R. 1963 S.C. 316. ² A.I.R. 1963 S.C. 1531.

accept oral evidence and basing himself entirely on this failure, ordered an acquittal. The High Court took additional evidence because it was of the opinion that this evidence was necessary. It is manifest that, if the High Court wished to rely on oral evidence, fair play at least demanded that the accused (appellant) should be given a chance of seeing the documents where the deposit by him would be mentioned, if made. Mr. Chakravarti contends that the Magistrate had drawn a presumption against the complainant from the failure of the complainant to produce this evidence and the order of the High Court deprived the appellant of the benefit of the presumption. There is no force in this argument which may be raised invariably in all cases in which the powers under section 428 are exercised. There was a serious defalcation of money. The money was received and the only question was whether it was deposited or not. Oral evidence showed that it was not. The accused insisted that the books of account should have been brought and so they were brought as a result of the order. The accused himself demanded that evidence and but for the vagueness of his demand, this evidence would have been produced earlier. Rather than take a different view of the oral evidence, the High Court rightly thought that interests of justice and fair play demanded that this additional evidence should be taken. In our judgment, the High Court acted within the powers conferred by the Code.

The appeal thus has no substance. It fails and is dismissed.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, J. C. SHAH AND J. R. MUDHOLKAR, JJ.

M/s A. C. Estates

.. *Appellant**

v.

M/s. Serajuddin & Co., and another

.. *Respondents.*

West Bengal Premises Rent Control (Temporary Powers) Act (XII of 1956), section 16 (3)—Scope and applicability—"Tenant"—Definition of under section 2 (h)—Applicability to section 16 (3)—Powers of Controller—Order declaring sub-tenant to be direct tenant—If can be cancelled while fixing rent on basis of subsequent events—Civil Procedure Code (V of 1908), sections 151 and 152 and Order 47—Powers under.

The word "tenant" is defined in section 2 (h) of the West Bengal Premises Rent Control (Temporary Powers) Act to include any person continuing in possession after the termination of his tenancy but shall not include any person against whom any decree or order for eviction had been made by a Court of competent jurisdiction. The definition in section 2 (h) will apply to section 16 (3) of the Act. So though a tenancy had been determined by a notice (of July 1954) by the landlord the tenancy will cease only when decree for ejectment was passed against him (on 22nd August, 1956) and a sub-tenant let in by the tenant before June, 1954 before the notice of July, 1954 will continue to be a sub-tenant after the coming into force of Act XII of 1956 from 31, March 1956. The sub-tenant is entitled to the benefits under section 16 (3).

It is not open to the Controller after he had made the order on 9th August, 1956, declaring the sub-tenant a direct tenant under the landlord subsequently while proceeding to fix rent to set aside that order on the basis of something that transpired after that order was passed for instance the order for ejectment of the tenant of the first degree (on 22nd August, 1956), between the date of the order declaring the sub-tenant as direct tenant and the date of fixing the rent (11th February, 1957) under section 16 (3). The Controller had no power to set aside the order that had been made on 9th August, 1956, for it was right when it was made and final. He had only to fix the rent.

It cannot be a case of review on the ground of discovery of new and important matter for such matter has to be something which existed at the date of the order and there can be no review of an order which was right when it was made on the ground of the happening of some subsequent event. Nor can the Controller in exercise of his powers under section 151, C.P. Code set aside the order which was right when it was made. Section 152 of the Code has no application as there was no clerical or arithmetical error.

Appeal by Special Leave from the Judgment and Order, dated 6th May, 1960 of the Calcutta High Court in Civil Rule No. 3578 of 1959.

S. C. Mazumdar, Advocate, for Appellant.

D. N. Mukherjee, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave against the judgment of the High Court of Calcutta. The appellant is the owner of premises bearing No. P.-116 Bentinck Street, Calcutta. It had let out a suite on the second floor of the premises on a monthly rental of Rs. 66 to Gee Tsing Po. The exact date when the suit was let to Po is not on the record but it was sometime before June, 1954. In June, 1954, Po sub-let the entire suite to respondent No. 1, Messrs. Serajuddin & Co., which will hereafter be referred to as the respondent. In July, 1954, the appellant gave notice to Po terminating his tenancy with the expiry of August, 1954. In September, 1954, the appellant filed a suit against Po praying for his ejectment on certain grounds under the West Bengal Premises Rent Control (Temporary Provisions) Act XVII of 1950, which was then in force. That suit was still pending when the West Bengal Premises Tenancy Act XII of 1956 (hereinafter referred to as the Act) came into force from 31st March, 1956. Section 16 (3) of the Act gave certain rights to sub-tenants. As the appeal turns on the interpretation of that provision, it is necessary to set it out here :—

" 16. (1)

(2) Where before the commencement of this Act, the tenant, with or without the consent of the landlord, has sublet any premises either in whole or in part, the tenant and every sub-tenant to whom the premises have been sublet shall give notice to the landlord of such sub-letting in the prescribed manner within six months of the commencement of the Act and shall in the prescribed manner notify the termination of such sub-tenancy within one month of such termination.

(3) Where in any case mentioned in sub-section (2) there is no consent in writing of the landlord and the landlord denies that he gave oral consent, the Controller shall, on an application made to him in this behalf either by the landlord or sub-tenant within two months of the date of the receipt of the notice of sub-letting by the landlord or the issue of the notice by the sub-tenant, as the case may be, by order declare that the tenant's interest in so much of the premises as has been sublet shall cease and that the sub-tenant shall become a tenant directly under the landlord from the date of the order.

The Controller shall also fix the rents payable by the tenant and such sub-tenant to the landlord from the date of the order. Rents so fixed shall be deemed to be fair rent for purposes of this Act."

The respondent took action under section 16 (3) as apparently the subletting to him by Po was not with the consent of the landlord, and made an application thereunder to the Controller on 4th June, 1956, and prayed that the Controller should declare that the interest of the tenant had ceased and the respondent had become the tenant directly under the landlord in respect of the suite in question. It was also prayed that fair rent of the premises should be fixed at Rs. 66 per mensem.

The application was opposed on behalf of the appellant and two main points were urged in that connection, namely:—(i) The tenancy of Po had been lawfully terminated at the end of August, 1954 and the suit for his ejectment was pending in the Small Cause Court and therefore the respondent could not take advantage of the Act in 1956, for it never became a sub-tenant in law before the Act was passed; and (ii) the respondent was not in fact the tenant of Po from before 31st March, 1956.

The matter came up before the Controller on 9th August, 1956. The Controller accepted the respondent's case that it had become the sub-tenant of Po in fact from 9th June, 1954. The Controller further held that in view of this fact, the respondent became a sub-tenant under the appellant in law, for in any case, the tenancy of Po had not been determined till August, 1954 even on the case put forward by the appellant. He therefore made the following order :—

"The applicant (i.e., Serajuddin & Co.), is therefore entitled to be declared to be a direct tenant under the O.P. No. 1. But this will not be sufficient to dispose of the present proceeding inasmuch as under section 16(3) of the Act of 1956 I am to fix the fair rent payable by the tenant and that of the sub-tenant."

He thereupon directed the Inspector to go to the locality and measure the accommodation of the disputed premises and other similar premises in the neighbourhood as might be shown by either or both parties. The Inspector was also directed to make note of advantages and amenities of all the premises measured by him and thereafter submit his report as to the fixation of fair rent. A date was fixed for the submission of the Inspector's report and thereafter the fair rent was to be fixed.

Before however the Inspector's report was received, the suit for ejectment of Po pending in the Court of Small Causes was decreed on 22nd August, 1956, and time was given to him to vacate the same by the end of October, 1956. Therefore on 11th September, 1956, the appellant filed what it called an additional written objection. In that, the appellant informed the Controller that a decree for ejectment against Po had been passed. It was urged that in view of that decree, Po was no longer a tenant of the appellant and therefore the respondent could not be a sub-tenant. The appellant prayed that the application of the respondent was not maintainable in the circumstances and the Controller had no jurisdiction to entertain the application and so the application should be dismissed. The matter then came up before the Controller on 29th January, 1957, on which date the appellant's additional objection as well as the Inspector's report was taken up for consideration. The Controller took some evidence on the question of fair rent and heard arguments on that day. On 11th February, 1957, the Controller passed final orders in which he said that there was no tenant of the first degree on that date, namely, 11th February, 1957. As the ejectment decree had been passed in accordance with the provisions of the 1950 Act, the sub-tenant had by operation of that law become a direct tenant. So according to the Controller there was no subsisting tenancy on 11th February, 1957, and no order could be passed under section 16 (3) of the Act. He consequently dismissed the application under section 16 (3), but passed no order as to costs.

The respondent then went in appeal to the Court of Small Causes, Calcutta, as provided in the Act. The Appeal Court held that the order of 9th August, 1956, made by the Controller was final and further as the entire premises had been sublet there was no necessity for any further determination of rent as the sub-tenant would be liable to pay the rent payable by the tenant. The Appeal Court therefore set aside the order of the Controller dismissing the application of the respondent and declared the respondent as tenant at a rental of Rs. 66 per month.

The appellant then applied under Article 227 of the Constitution to the High Court and two main points were urged on its behalf before the High Court, namely .

(i). The order of 9th August, 1956 was not a final order for the purpose of section 16 (3) and therefore it was open to the Controller to rescind that order when the further fact of the ejectment decree of 22nd August, 1956, was brought to his notice ;

(ii) Section 16 (3) applies only when the original tenancy also subsists upto the date of the final order which the Controller was proposing to make on 29th January, 1957, and which he eventually refused to make because by that date the tenancy of Po had come to an end by the ejectment decree of 22nd August, 1956

The High Court held that section 16 (3) was in two parts . first relating to the declaration of the sub-tenant as a tenant in place of the tenant of the first degree and second relating to the fixation of fair rent for the part or whole of the premises in respect of which the declaration was made . It further held that the declaration of 9th August, 1956 under the first part of section 16 (3) was final and the Controller had no jurisdiction after 9th August, 1956, to rescind it. The High Court pointed out that as on 9th August, 1956, when the order under the first part of section 16 (3) was passed, the tenancy of the tenant of the first degree was subsisting, action could be taken under section 16 (3) in favour of the respondent . In this view of the matter, the revision application of the appellant was dismissed except as to the fixation of rent. It is this order of the High Court which is being impugned before us by Special Leave.

We are of opinion that the appeal must fail. There is a clear finding of the Controller that the respondent was inducted as a sub-tenant by Po in June, 1954. At that time, the appellant had not even given notice to Po determining his tenancy. It was only in July, 1954 that notice was given to Po determining the tenancy as from the end of August, 1954. Therefore, the respondent became a sub-tenant of the tenancy which Po held under the appellant.

The next question is whether the respondent was entitled to the benefit of the Act which came into force on 31st March, 1956. On that date a suit was pending against Po based on the notice given to him in July, 1954 determining his tenancy. The argument on behalf of the appellant is that as Po's tenancy had been determined by the end of August, 1954 by virtue of the notice referred to above, the respondent was no longer sub-tenant on 31st March, 1956, as the tenancy of the tenant of the first degree had itself come to an end. This in our opinion is not correct. The word "tenant" is defined in section 2 (h) of the Act to include any person continuing in possession after the termination of his tenancy but shall not include any person against whom any decree or order for eviction had been made by a Court of competent jurisdiction. In view of this inclusive definition of the word "tenant" in the Act Po would continue to be a tenant under the Act though his tenancy had been determined by notice and he ceased to be a tenant only on 22nd August, 1956, when the decree for ejectment was passed against him. It is true that the definitions in section 2 are subject to anything being repugnant in the subject or context. But we see nothing repugnant in the subject or context of section 16 (3) to persuade us to hold that the definition of tenant in section 2 (h) would not apply to a case under section 16 (3). The Act is a measure for the protection of tenants and sub-tenants and should not be so interpreted as to take away the protection which it intends to give to them. We are therefore of opinion that Po continued to be a tenant upto 22nd August, 1956 and therefore the respondent continued to be a sub-tenant after the coming into force of the Act.

This takes us to the order of 9th August, 1956. We have already set out section 16 (3) and there is no doubt that it consists of two parts. Under the first part, the Controller has to declare by order that the tenant's interest in so much of the premises as has been sublet has ceased and the sub-tenant has become a tenant directly under the landlord from the date of the order. The second part gives power to the Controller to fix rents payable by the tenant and such sub-tenant to the landlord from the date of the order. It may be that both orders under the two parts may be passed on the same date: but it appears what usually happens is that the Controller first declares that the tenant's interest has ceased and the sub-tenant has become a tenant directly under the landlord, and thereafter proceeds to fix rent under the second part after taking such further evidence as he considers necessary. Even so, the order under the first part declaring that the tenant's interest has ceased and the sub-tenant has become a tenant directly under the landlord must be treated as final so far as the Controller is concerned and it cannot be a mere interlocutory order, which could be rescinded by the Controller while he is taking steps to fix the rent as provided in the second part of section 16 (3). In this connection our attention is drawn to the decision of the Calcutta High Court in *Anil Kumar Mukherjee v. Malin Kumar Mazumdar*¹, where it was held with reference to section 29 of the Act that the words "final order" there mean the order making the declaration and fixing the rent under section 16 (3) or the order dismissing the application under section 16 (3). We do not propose to consider whether *Mukherjee's case*¹ is correctly decided. Assuming it to be correct, what it lays down *inter alia* is that an order under the first part of section 16 (3) merely making a declaration without the further order fixing rent under the second part thereof is not appealable as a final order under section 29. But what we are concerned with here is whether it was open to the Controller after he had made the order declaring the sub-tenant a direct tenant under the landlord to set aside that order subsequently while proceeding to fix rent on the basis of something which transpired after that order had been passed. We are of opinion that an order like that passed on 9th August, 1956,

must be taken to be final in so far as it declares the tenancy of the tenant of the first degree to have ceased and declares the sub-tenant to be the direct tenant of the landlord, so far as the Controller is concerned. After having made such a declaration it is not open to the Controller (while proceeding to fix rent under the second part of that section) on some ground which supervenes after the date of the order to rescind it. Our attention in this connection is drawn to section 29 (5) of the Act which gives power to the Controller to review his orders on the conditions laid down under Order 47 of the Code of Civil Procedure. But this cannot be a case of review on the ground of discovery of new and important matter, for such matter has to be something which existed at the date of the order and there can be no review of an order which was right when made on the ground of the happening of some subsequent event (see *Rajah Kotagiri Venkata Subbamma Rao v. Raja Vellanki Venkatrama Rao*)¹. Section 29 (5) further gives power to the Controller to act under section 151 or section 152 of the Code of Civil Procedure. Section 152 has no application in the present case for there is no clerical or arithmetical mistake here. Nor can the Controller in our opinion set aside an order which was right when it was made, under section 151 of the Code of Civil Procedure as there is no question in such circumstances of subverting the ends of justice or preventing the abuse of the process of the Court. We are therefore of opinion that the Controller had no power to set aside the order that had been made on 9th August, 1956, for it was right when it was made. The view taken by the High Court in this connection is correct.

It is equally clear that when the Controller passed the order on 11th February, 1957, dismissing the application under section 16 (3) that order was appealable under section 29 (1), for it was undoubtedly a final order within the meaning of section 29 (1) and the respondent would be entitled to appeal therefrom.

Finally there is nothing in the contention of the appellant that section 16 (3) would not apply because the tenant had been ejected on 22nd August, 1956, and thereafter the sub-tenant could not claim the benefit of section 16 (3). In the present case the benefit of section 16 (3) was given to the tenant not after 22nd August, 1956, but before that date, i.e., on 9th August, 1956. That order so far as it went was final and was not open to review or cancellation by the Controller who had thereafter only to fix the rent under the second part of section 16 (3). While going on with the proceeding for fixation of rent, the Controller could not set aside the order already made under the first part of section 16 (3) on 9th August, 1956, and in so far as he did so, he acted without jurisdiction.

The Appeal Court was therefore right in setting aside the order of the Controller and the High Court was equally right in dismissing the application by the appellant except as to fixation of rent.

The appeal therefore fails and is hereby dismissed with costs.
K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO AND J. R. MUDHOLKAR, JJ.

Kurban Hussein Mohamedalli Rantawalla

.. *Appellant**

v.

The State of Maharashtra

.. *Respondent.*

Penal Code (XLV of 1860), sections 304-A, 285—Rash and negligent act—Death caused—Where constitutes offence under section 304-A—Licence to manufacture paints by wet process—General and special conditions relating to using fire and storage of combustible material—Conversion to manufacturing paint by heat process in violation of conditions—Act to employee in pouring turpentine into barrel of bitumen not reduced to prescribed temperature without stirring the mixture—Mixture frothing overflowing setting fire to combustible material, causing death of workmen—Manager, if liable to be convicted under section 304-A.

The appellant is the manager and working partner of firm licensed under general and special conditions, to manufacture paints and varnishes under a cold process only. The factory was converted.

¹ (1901) L.R. 27 I.A. 197. 10 M.L.J. 221 : 1 L.R. 24 Mad 1 (P.C.).

* C.A. No. 67 of 1963.

15th December, 1964.

to a process of manufacturing wet paints by heating, using burners in a room nearby in which were stored combustible materials like varnish and turpentine. The process of manufacturing wet paints by heating was done by boiling rosin contained in barrels of four and half feet height and after it had cooled down to below 79 degrees centigrade, by adding turpentine to it keeping the mixture constantly stirred. On a day on which the appellant was not present, an employee lifted a barrel of five gallons of turpentine and poured into hot rosin singlehanded without being able to stir the mixture and without waiting for the rosin to come down to the required temperature. As a consequence, the mixture began to froth and overflowed setting fire to the combustible materials stored nearby and causing the death of seven workmen. The appellant convicted under sections 304-A and 285 of the Penal Code, by Special Leave, appealed to the Supreme Court,

Held, the conviction and sentence under section 285 is confirmed; conviction under section 304-A of the Penal Code cannot be sustained.

For a person to be guilty of offence under section 304-A the rash and negligent act should be the direct and proximate cause of the death.

The direct and proximate cause of the fire which resulted in the death of the workmen was the act of the employee. The mere fact that the appellant allowed the burners to be used in the same room where the combustible materials were stored, even though it may be a negligent act, would not be enough to make the appellant responsible for the fire which broke out. The cause of the fire was not merely the presence of burners in the room, though this circumstance was indirectly responsible for the breaking out of the fire.

The appellant did not have licence to manufacture wet paints and therefore when he allowed it in the circumstances, must be held to have knowingly, or at any rate negligently omitted to take such order with any fire or combustible matter within the scope of section 285 of the Penal Code. The appellant also acted against the general and special conditions relating to the storage of combustible materials, lighting fire in the room containing such combustible materials and thus was properly convicted under section 285 of the Penal Code.

Appeal by Special Leave from the Judgment and Order dated the 8th April, 1963 of the Bombay High Court in Criminal Appeal No. 433 of 1963.

S. T. Desai, Senior Advocate (*J. B. Dadachanji, O. C. Mathur and Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

S. G. Patwardhan, Senior Advocate (*B. R. G. K. Achar*, Advocate, for *R. H. Dhebar*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—This appeal by Special Leave against the judgment of the Bombay High Court raises questions regarding the interpretation of section 304-A and section 285 of the Indian Penal Code. The facts are not now in dispute and may be briefly set out as found by the Courts below. The appellant along with three partners is the owner of a factory styled as Carbon Dry Colour Works which manufactures paints and varnish. The factory was licensed by the Bombay Municipality in the year 1953 to manufacture paints involving a cold process and was located at 79/81, Jain Road, Dongri. The factory was also licensed to store 455 litres of turpentine, 455 litres of varnish and 14,000 gallons of paint. The licence was issued subject to certain conditions to which we shall refer later. The appellant is the manager and working partner. He converted the factory from the cold process of manufacturing dry paints to a process of manufacturing wet paints by heating. For that purpose four burners were used for the purpose of melting rosin or bitumen by heating them in barrels over the burners and adding turpentine thereto after the temperature cooled down to a certain degree. On 20th April, 1962, this process was going on in the factory which had no licence for manufacturing wet paints through heating. Hatim Tasduq was the person looking after the operation. According to him the rosin was melted on one burner and lime was added and the whole thing was boiled for half an hour. Thereafter the burner was extinguished and the barrel in which the rosin was melted was allowed to cool. This began at about 4 P.M. The barrel in which the rosin is melted is about 4½ feet high and after the temperature comes down to a certain level turpentine is added in the barrel to

prepare Black Japan. Hatim Tasduq takes a drum of 5 gallons of turpentine which is poured into the barrel. As turpentine is poured, the mixture begins frothing and in order to keep down the froth the whole thing is stirred all the time. One man helps Hatim Tasduq in this operation. On 20th April, 1962, rosin was melted and the barrel was allowed to cool from 4 P.M. At about 5 P.M. Hatim started pouring turpentine into the barrel. It may be mentioned that 5 P.M. is the closing time and the process of pouring turpentine started just about that. As soon as Hatim started pouring turpentine the mixture began to froth. Hatim was unable to stir as according to him his assistant had gone some distance and he could not give the drum of turpentine to him so that he might stir the mixture. The result was that froth overflowed out of the barrel and because of heat, varnish and turpentine, which were stored at a short distance, caught fire. Seven men were working in a loft which is reached by a ladder and where manufactured paint is stored. The material in the premises being of combustible nature, the fire spread rapidly. Those who were working on the ground-floor managed to get out with burns only but those who were working in the loft could not get out in time with the result that all seven of them were burnt to death. The fire-brigade was sent for, but in view of the combustible nature of the material stored, it took 2½ hours to bring the fire under control. After the fire was controlled, bodies of four workmen were recovered the same night. Next morning two more bodies were recovered and in the afternoon one more body was found. Thus seven of the workmen lost their lives while seven other workmen suffered burns and were sent to hospital where they were treated as in-door patients. It may be mentioned that the appellant was not present on the premises when the fire took place, though he came there as soon as the information about it reached him.

These facts have been found by Courts below to be proved. Originally the other three partners were also prosecuted but the Magistrate acquitted them as the appellant was the managing partner and was directly in charge of work in the factory. On these facts the appellant was convicted under section 304-A and section 285 of the Indian Penal Code and it is the correctness of that conviction which is being assailed in the present appeal. The appellant appealed to the High Court but his appeal was summarily dismissed. His application for leave to appeal to this Court having been refused, he came to this Court and was granted Special Leave.

We shall first take up section 304-A which runs thus :—

“Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

The main contention of the appellant is, that he was not present when the fire broke out resulting in the death of seven workmen by burning and it cannot therefore be said that he caused the death of these seven persons by doing any rash or negligent act. The view taken by the Magistrate on the other hand which appears to have been accepted by the High Court was that as the appellant allowed the manufacture of wet paints in the same room where varnish and turpentine were stored and the fire resulted because of the proximity of the burners to the stored varnish and turpentine, he must be held responsible for the death of the seven workmen who were burnt in the fire. We are however of opinion that this view of the Magistrate is not correct. The mere fact that the appellant allowed the burners to be used in the same room in which varnish and turpentine were stored, even though it might be a negligent act, would not be enough to make the appellant responsible for the fire which broke out. The cause of the fire was not merely the presence of burners in the room in which varnish and turpentine were stored, though this circumstance was indirectly responsible for the fire which broke out. But what section 304-A requires is causing of death by doing any rash or negligent act, and this means that death must be the direct or proximate result of the rash or negligent act. It appears that the direct or proximate cause of the fire which resulted in seven deaths was the act of Hatim. It seems to us clear that Hatim was apparently in a hurry and therefore

he did not perhaps allow the rosin to cool down sufficiently and poured turpentine too quickly. The evidence of the expert is that the process of adding turpentine to melted rosin is a hazardous process and the proportion of froth would depend upon the quantity of turpentine added. The expert also stated that if turpentine is not slowly added to bitumen and rosin before it is cooled down to a certain temperature, such fire is likely to break out. It seems therefore that as turpentine was being added at about closing time, Hatim was not as careful as he should have been and probably did not wait sufficiently for bitumen or rosin to cool down and added turpentine too quickly. The expert has stated that bitumen or rosin melts at 300 degrees F. and if turpentine is added at that temperature, it will catch fire. The flash point of turpentine varies from 76 to 110 degrees F. Therefore the cooling must be brought down, according to the expert, to below 76 degrees F. to avoid fire. In any case even if that is not done, turpentine has to be added slowly so that there may not be too much frothing. Clearly therefore the fire broke out because bitumen or rosin was not allowed to cool down sufficiently and turpentine was added too quickly in view of the fact that the process was performed at closing time. It is clearly the negligence of Hatim which was the direct or proximate cause of the fire breaking out, though the fact that burners were kept in the same room in which turpentine, and varnish were stored was indirectly responsible for the fire breaking out and spreading so quickly. Even so in order that a person may be guilty under section 304-A, the rash or negligent act should be the direct or proximate cause of the death. In the present case it was Hatim's act which was the direct and proximate cause of the fire breaking out with the consequence that seven persons were burnt to death; the act of the appellant in allowing turpentine and varnish being stored at a short distance was only an indirect factor in the breaking out of fire.

We may in this connection refer to *Emperor v. Omkar Rampratap*¹ where Sir Lawrence Jenkins had to interpret section 304-A and observed as follows:—

"To impose criminal liability under section 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the *causa sine qua non*."

This view has been generally followed by High Courts in India and is in our opinion the right view to take of the meaning of section 304-A. It is not necessary to refer to other decisions, for as we have already said this view has been generally accepted. Therefore the mere fact that the fire would not have taken place if the appellant had not allowed burners to be put in the same room in which turpentine and varnish were stored, would not be enough to make him liable under section 304-A, for the fire would not have taken place, with the result that seven persons were burnt to death, without the negligence of Hatim. The death in this case was therefore in our opinion not directly the result of a rash or negligent act on the part of the appellant and was not the proximate and efficient cause without the intervention of another's negligence. The appellant must therefore be acquitted of the offence under section 304-A.

This brings us to section 225 which runs as follows—

"Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

We are in the present case concerned with the second part of section 225 which runs thus:

"Whoever knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter, shall be punished"

The question is whether the appellant on the facts which have been proved knowingly or negligently omitted to take such order with fire or combustible matter in his possession as was sufficient to guard against probable danger to human life from such fire or combustible matter. In this connection we may refer to the fact that the appellant did not have a licence for manufacturing wet paints and therefore when he allowed wet paints to be manufactured in the circumstances which have been proved, he must be held to have knowingly acted in a manner in which he should not have done. There is a map on the record which shows that four burners were in one corner while turpentine and varnish were in another corner of the same room, and the distance between the burners and the stores was about 8 or 10 feet. The licence for storage given to the appellant contained general and special conditions. One of the general conditions was that "the licensee shall not use or permit to be used any portion of the licensed premises for dwelling or cooking purposes and no fire shall be lighted therein other than what is authorised". The articles stored being combustible, this general condition was imposed on the appellant and he had no business to light any fire in the room where stores were kept unless he was authorised to do so. There is no proof that he was authorised to light any fire in that room, and therefore he acted in breach of the general condition of the licence which forbade him from lighting any fire in the room where varnish and turpentine were stored. We take it that when the general condition says that no fire would be lighted except what is authorised, the intention must have been that the Municipal Committee will take necessary steps to see that the fire would be sufficiently guarded, if lighted in the same room, so that there may not be any outbreak of fire. The appellant clearly acted against this general condition of the licence and must be held to have knowingly, or at any rate negligently omitted to take such order with any fire or any combustible matter in his possession as was required. Further the special conditions for keeping turpentine and varnish and paint require that "no smoking, light or fire in any form shall be permitted at any time" in the room in which paints, turpentine and varnish are kept or even in any premises licensed for storage unless in the case of a light, such light be duly protected and on no account be naked. The appellant clearly committed breach of this special condition also in allowing the lighting of four burners in the same room without taking any precaution for duly protecting the fire and even allowed it to be naked. It must therefore be held that the appellant negligently or knowingly omitted to take proper order with the fire or combustible matter in his possession. The contention on behalf of the appellant however is that even if he may have negligently or knowingly omitted to take proper order with the fire or combustible matter in his possession it cannot be said that his omission to take proper order was such as was insufficient to guard against any probable danger to human life. What is urged is that his not taking precautions may result in possible danger to human life but it cannot be said that this omission was such as would result in probable danger to human life. In particular it is urged that this method of work had been going on for some years and no fire had broken out and this shows that though there may have been possible danger to human life from such fire or combustible matter there was no probable danger. We are unable to accept this contention. The fact that there was no fire earlier in this room even though the process had been going on for some years is not a criterion for determining whether the omission was such as would result in probable danger to human life. We have already pointed out that four burners were in one corner of the room and the combustible matter was in another corner of the same room and there was only a distance of 8 or 10 feet between the two. The burners were lighted against the general as well as the special conditions of the licence for storage granted to the appellant. The proximity of naked fire to the stores of turpentine and varnish is in our opinion always a matter of probable danger to human life, namely, the life of the persons working in the room. This was particularly so with respect to turpentine which has a low flash point *i.e.*, 76 degrees F. to 110 degrees F. The use of naked fire could in conceivable circumstan-

ces even raise the temperature of the room itself above the flash point of turpentine and if the turpentine ever happened to be exposed it might easily catch fire. There was in our opinion therefore always a probable danger to human life by the appellant negligently or knowingly omitting to take proper care in the matter of the four burners and turpentine and varnish. His action in allowing burners to be lighted in the room without any safeguard did in our opinion amount to omission to take such order with fire and combustible matter as would be sufficient to guard against probable danger to human life. We can only say that it was lucky that fire had not broken out earlier. But there can be no doubt that the omission of the appellant to take proper care with burners in particular when such combustible matter as turpentine in large quantity was stored at a distance of 8 to 10 feet from the burners was such omission as amounted to insufficient guard against probable danger to human life. Finally when we remember that all this was done in breach of the general and special conditions of the licence given to the appellant for storage of turpentine, varnish and paints, we have no doubt that the appellant knowingly, or at least negligently, failed to take such order with fire and the combustible matter as would be sufficient to guard against any probable danger to human life. In the circumstances we are of opinion that the appellant has been rightly convicted under section 285 of the Indian Penal Code. Considering that seven lives have been lost on account of the negligence of the appellant in this connection, the sentence of six months' rigorous imprisonment which is the maximum provided under section 285, cannot be said to be harsh.

We therefore partially allow the appeal and set aside the conviction and sentence of the appellant under section 304-A of the Indian Penal Code. The appeal is dismissed so far as his conviction under section 285 of the Indian Penal Code is concerned. The appellant will surrender to his bail to serve the remaining sentence under section 285 of the Indian Penal Code.

V.S.

Appeals partially allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ.

National Bank of Lahore Ltd. (In all the Appeals.)

.. *Appellant**

v.

Sohan Lal Saigal and others

.. *Respondents.*

Limitation Act (IX of 1908), Articles 36 and 115—Scope and applicability—Plaintiff entering into contract hiring lockers in the safe deposit vault of defendant bank—Manager of bank tampering with lockers and committing theft of valuables in the course of his employment—Theft facilitated by breach of terms of contract—Suit against bank for damages—If governed by Article 36 or 115.

The scope of Article 36 of the Limitation Act (IX of 1908) is fairly well settled. The Article applies to acts or omissions commonly known as torts in English law. They are wrongs independent of contract. Article 36 applies to actions "*ex delicto*" whereas Article 115 applies to actions "*ex contractu*". These torts are often considered as of three kinds, *viz.*, non-feasance or the omission of some act which a man is by law bound to do, misfeasance, being the improper performance of some lawful act, or malfeasance, being the commission of some act which is in itself unlawful. But to attract Article 36 these wrongs shall be independent of contract.

The plaintiff entered into a contract with the respondent bank whereby he hired certain lockers in the safe deposit vault in one of its branches through its Manager. The purpose of the contract was to ensure the safety of the articles deposited by him in the safe deposit vault. It was implicit in the contract, and so was an implied term thereof, that the lockers supplied must necessarily be in a good condition to achieve that purpose. To achieve the same purpose the contract also provided that the bank should not allow access to any person to the safe except the hirer or his authorised agent. The

said lockers were tampered with and the valuables kept therein were removed by the Manager himself. The plaintiff filed a suit against the bank for the recovery of damages caused to him thereby. In the plaint filed by him he claimed relief mainly on two grounds : (i) that it was an implied term of the contract that the lockers rented were in a good condition, and (ii) the valuables were lost because the Manager on account of the negligence of the bank in not taking all the necessary precautions, committed theft of the articles in the course of his employment. In the written-statement the defendant denied its liability both under the terms of the contract and also on the basis that it was not liable for the agent's fraud. The lower appellate Court found that at the time when the lockers were rented out they were in a defective condition and that the bank in actual practice made the Manager the sole custodian with full control over the keys of the strong room and permitted a great deal of laxity in not having any check whatsoever on him.

On these facts it was contended that the suit was not based on breach of contract committed by the bank but only on the fraud of the Manager during the course of his employment and so was governed by Article 36 of the Limitation Act (IX of 1908).

Held, there was clear allegation in the plaint that the defendant committed breach of the contract in not complying with some of the conditions of the contract and the defendant understood the allegations in that light and traversed them. The suit claim thus being "*ex contractu*" was clearly governed by Article 115 and not by Article 36.

Even if the claim was solely based on the fraud committed by the Manager during the course of his employment, it would not fall under Article 36. The fraud of the Manager committed in the course of his employment must be deemed to be a fraud of the principal so that the bank must be deemed to have permitted its Manager to commit theft in violation of the terms of the contract. While under the contract the bank was under an obligation to give good lockers, it gave defective ones facilitating theft and while under the contract it should not permit access to the safe to persons other than the hirer and his agents, it gave access to its Manager and enabled him to commit theft. In either case the wrong committed was not independent of the contract but arose directly out of the breach of contract. In such circumstances Article 36 would be out of place.

Appeals by Special Leave from the Judgment and Decree dated 11th October, 1961 of the Punjab High Court in Regular First Appeals Nos. 136, 137 and 138 of 1959.

Hans Raj Sawhney, Senior Advocate, (*B. C. Misra*, Advocate with him), for Appellant (In all the Appeals).

B. R. L. Iyengar, *S. K. Mehta* and *K. L. Mehta*, Advocates, for Respondents (In C.A. No. 929 of 1963).

V. D. Mahajan, Advocate, for Respondent (In C.A. No. 930 of 1963).

Kanwar Rajendra Singh and *Vidya Sagar Nayyar*, Advocates, for Respondent (In C.A. No. 931 of 1963).

The Judgment of the Court was delivered by

Subba Rao, J.—These appeals by Special Leave raise a question of limitation.

The National Bank of Lahore Limited, hereinafter called the Bank is a banking concern registered under the Indian Companies Act and having its registered office in Delhi and branches at different places in India. Though its main business is banking, it carries on the incidental business of hiring out lockers out of cabinet-in safe deposit vaults to constituents for safe custody of their jewels and other valuables. It has one such safe deposit vault at its branch in Jullundur. The respondents herein hired lockers on rental basis from the Bank at Jullundur through its Manager under different agreements on different dates during the year 1950. In April, 1951 the said lockers were tampered with and the valuables of the respondents kept therein were removed by the Manager of the Jullundur branch of the Bank. In due course the said Manager was prosecuted before the Additional District Magistrate, Jullundur, and was convicted under sections 380 and 409 of the Indian Penal Code. The respondents filed 3 suits in the Court of the Subordinate Judge, Jullundur, against the Bank for the recovery of different sums on account of the loss of the valu-

able contents of the lockers hired by them. The Bank denied its liability on various grounds and also contended that the suits were barred by limitation.

The learned Subordinate Judge held that the Bank was liable to bear the loss incurred by the plaintiffs and that the suits were not barred by limitation. On appeal, the High Court of Punjab accepted the findings of the learned Subordinate Judge on both the questions and dismissed the appeals. The present appeals arise out of the said judgment of the High Court.

The only question raised in these appeals is one of limitation. Before considering the question of limitation it is necessary to notice briefly the findings of fact arrived at by the High Court. The High Court summarized its findings thus :

(1) The whole object of a safe deposit vault in which customers of a Bank can rent lockers for placing their valuables is to ensure their safe custody. The appellant-Bank had issued instructions and laid down a detailed procedure for ensuring that safety but in actual practice the Manager alone had been made the custodian with full control over the keys of the strong room and a great deal of laxity had been observed in having no check whatsoever on him.

(2) The lockers had been rented out to the plaintiffs by the Manager Baldev Chand, who was entrusted with the duty of doing so. It was he who had intentionally rented out such lockers to the plaintiffs which had been tampered with by him. This constituted a fraud on his part there being an implied representation to the plaintiffs that the lockers were in a good and sound condition.

(3) Although the Bank authorities were not aware of what Baldev Chand was doing, but the fraud, which he perpetrated, was facilitated and was the result of the gross laxity and negligence on the part of the Bank authorities.

(4) The lockers were indisputably being let out by the Manager to secure rent for the Bank

Having found the said facts, the High Court held that the fraud was committed by the Manager acting within the scope of his authority and, therefore, the Bank was liable for the loss incurred by the respondents. Then it proceeded to consider the question of limitation from three aspects, namely, (i) the loss was caused to the respondents, as the Manager of the Bank committed fraud in the course of his employment ; (ii) there was a breach of the implied condition of the contract, namely, that only such lockers would be rented out which were safe and sound and which were capable of being operated in the manner set out in the contract ; and (iii) there was a relationship of bailor and bailee between the respondents and the Bank, and therefore the Bank would be liable on the basis of the contract of bailment. It held that from whatever aspect the question was approached Article 36 of the First Schedule to the Limitation Act would be out of place and the respondents' claims would be governed by either Article 95 or some other article of the Limitation Act.

Learned Counsel for the appellant accepted the findings of fact, but contended that on the facts found the suits were barred by limitation. Elaborating the argument the learned Counsel pointed out that the theft of the valuables by the Manager was a tort committed by him *de hors* the contracts entered into by the appellant with the respondents and, therefore, Article 36 of the First Schedule to the Limitation Act was immediately attracted to the respondents' claims

The scope of Article 36 of the First Schedule to the Limitation Act is fairly well settled. The said article says that the period of limitation " for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specifically provided for " is two years from the time when the malfeasance, misfeasance or non-feasance takes place. If this article applied, the suits having been filed more than 2 years after the loss of the articles deposited with the Bank, they would be clearly out of time. Article 36 applied to acts or omissions commonly known as torts by English lawyers. They are wrongs independent of contract. Article 36 applies to actions *ex delicto* whereas Article 115 applies to actions *ex contractu*. " These torts are often considered as of three kinds, *viz.*, non-feasance or the omission of some act which a man is by law bound to do, misfeasance, being the improper performance of some lawful act, or malfeasance, being the commission of some act which is in itself unlawful ". But to attract Article 36 these wrongs shall be independent of contract. The meaning of the words " independent of contract "

has been felicitously brought out by Greer, L.J., in *Jarvis v. Moy, Davies, Smith, Vandervaul & Co.*¹, thus :

"The distinction in the modern view, for this purpose, between contract and tort may be put thus. Where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract it is tort and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."

If the suit claims are for compensation for breach of the terms of the contracts, this article has no application and the appropriate article is Article 115, which provides a period of 3 years for compensation for the breach of any contract, express or implied, from the date when the contract is broken. If the suit claims are based on a wrong committed by the Bank or its agent *de hors* the contract, Article 36 will be attracted.

Let us now apply this legal position to the claims in question. One of the contracts that was entered into between the plaintiffs and the Bank is dated 5th February, 1951. It is not disputed that the other two contracts, with which we are concerned, also are of the same pattern. Under that contract the Bank, the appellant herein, and Sohanlal Sehgal, one of the respondents herein, agreed "to hire, subject to the conditions endorsed, the company's safe No. 1651/2203 Class lower for one year from this day at a rent of Rs. 40". The relevant conditions read as follows :

14. It is agreed that the connection of the renter of the safe and the Bank (and it has no connection) is that of a lessor and lessee for the within mentioned safe and not that of a banker and customer.

15. The liability of the company in respect of property deposited in the said safe is limited to ordinary care in the performance by employees and officers of company of their duties and shall consist only of (a) keeping the safe in vault where located when this rental contract is entered into or in one of equal specifications, the door to which safe shall be locked at all time except when an officer or an employee is present, (b) allowing no person access to said safe, except hirer or authorised deputy, or attorney in fact having special power to act identification by signature being sufficient or his/her legal representative in the case of death, insolvency or other disability of hirer, except as herein expressly stipulated. An unauthorised opening shall be presumed or inferred from proof of partial or total loss of contents.

16. The company shall not be liable for any delay caused by the failure of the vault doors or locks to operate.

17. The company shall not be liable for any loss, etc.

The only purpose of the contract was to ensure the safety of the articles deposited in the safe deposit vault. It was implicit in the contract that the lockers supplied must necessarily be in a good condition to achieve that purpose and, therefore, that they should be in a reasonably perfect condition. It was an implied term of such a contract. Condition 15 imposed another obligation on the Bank to achieve the same purpose, namely, that the Bank should not allow access to any person to the safe except the hirer or his authorised agent or attorney. If the articles deposited were lost because one or other of these two conditions was broken by the Bank, the renter would certainly be entitled to recover damages for the said breach. Such a claim would be *ex contractu* and not *ex delicto* and for such a claim Article 115 of the First Schedule to the Limitation Act applied and not Article 36 thereof.

Learned Counsel for the appellant contended that the suits were not based upon the breach of a contract committed by the Bank but only the theft committed by its agent *de hors* the terms of the contract. This leads us to the consideration of the scope of the complaints presented by the respondents. It would be enough if we take one of the complaints as an example, for others also run on the same lines. Let us take the complaint in Civil Suit No. 141 of 1954, *i.e.*, the suit filed by Sohanlal Sehgal and others against the Bank for the recovery of a sum of Rs. 26,500. We have carefully gone through the complaint, particularly Paragraphs 8, 9 and 10 thereof. It will be seen from the complaint that though it was not artistically drafted the relief was claimed mainly on two grounds, namely, (1) that it was an implied term of the contract that the

locker rented was in a good condition, and (ii) the valuables were lost because the Manager, on account of the negligence of the Bank in not taking all the necessary precautions, committed theft of the articles in the course of his employment. In the written statement the defendant denied its liability both under the terms of the contract and also on the basis that it was not liable for the agent's fraud. The High Court found that at the time when the lockers were rented out they were in a defective condition and that the Bank, in actual practice, made the Manager the sole custodian with full control over the keys of the strong room and permitted a great deal of laxity in not having any check whatsoever on him. In this state of the pleadings and the findings it is not possible to accept the contention of the learned Counsel for the appellant that the plaintiffs did not base their claims on the breach of the conditions of the contracts. This argument is in the teeth of the allegations made in the plaint, evidence adduced and the arguments advanced in the Courts below and the findings arrived at by them. While we concede that the plaint could have been better drafted and couched in a clearer language, we cannot accede to the contention that the plaints were solely based upon the fraud of the Manager in the course of his employment. We, therefore, hold that there were clear allegations in the plaints that the defendant committed breach of the contracts in not complying with some of the conditions thereof and that the defendant understood those allegations in that light and traversed them. The suit claims, being *ex contractu*, were clearly governed by Article 115 of the First Schedule to the Limitation Act and not by Article 36 thereof.

If Article 115 applied, it is not disputed that the suits were within time.

Even if the claim was solely based on the fraud committed by the Manager during the course of his employment, we do not see how such a claim fell under Article 36 of the First Schedule to the Limitation Act. To attract Article 36, the misfeasance shall be independent of contract. The fraud of the Manager committed in the course of his employment is deemed to be a fraud of the principal, that is to say the Bank must be deemed to have permitted its manager to commit theft in violation of the terms of the contracts. While under the contracts the Bank was under an obligation to give to the respondents good lockers ensuring safety and protection against theft, it gave defective ones facilitating theft; while under the contracts it should not permit access to the safe to persons other than those mentioned in the contracts, in violation of the terms thereof it gave access to its Manager and enabled him to commit theft. In either case the wrong committed was not independent of the contract, but it directly arose out of the breach of the contract. In such circumstances Article 36 is out of place. The competition between Article 115 and Article 120 to take its place need not be considered, for neither of those Articles hits the claim, as the suits are within 3 years, which is the shorter of the two periods of limitation prescribed under the said two Articles.

In this view it is not necessary to express our view on the question whether the contracts in question were of bailment.

In the result, the appeals fail and are dismissed with costs. One hearing fee.

V.K.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, M. HIDAYATULLAH, J. R. MUDHOLKAR AND S.M. SIKRI, JJ.

Anda and others

.. Appellants*

v.

The State of Rajasthan

.. Respondent.

Penal Code (XLV of 1860), sections 34, 35, 38, 299 and 300—Scope content and applicability of sections 299 and 300—Culpable homicide when turns into murder—Scope of sections 34, 35 and 38—Clause Thirdly of section 300 read with section 34—When attracted.

The offence of culpable homicide under section 299 of the Penal Code (XLV of 1860) involves the doing of an act (which includes illegal omissions) (a) with the intention of causing death or (b) with the intention of causing such bodily injury as is likely to cause death or (c) with the knowledge that the act is likely to cause death. If death is caused in any of these three circumstances, the offence of culpable homicide is said to be committed. The existence of the three circumstances (a), (b) and (c) distinguishes homicide which is culpable from homicides which are lesser offences or which are excusable altogether. Intent and knowledge in the ingredients of the section postulate the existence of a positive mental attitude and this mental condition is the special *mens rea* necessary for the offence. The guilty intention in the first two conditions contemplates the intended death of the person harmed or the intentional causing of an injury likely to cause his death. The knowledge in the third condition contemplates knowledge of the likelihood of the death of the person.

Murder is an aggravated form of culpable homicide. The existence of one of the four conditions mentioned in section 300 of the Penal Code turns culpable homicide into murder while the special exceptions in the same section reduce the offence of murder again to culpable homicide not amounting to murder.

Under the first clause of section 300 culpable homicide is murder when the act by which death is caused is done with the intention of causing death. This clause reproduces the first part of section 299. An intentional killing is always murder unless it comes within one of the special exceptions in section 300 in which case it becomes culpable homicide not amounting to murder.

Under the clause *Secondly* in section 300, putting aside the exceptions contained therein, culpable homicide is again murder if the offender does the act with the intention of causing such bodily injury which he knows to be likely to cause the death of the person to whom harm is caused. This knowledge must be in relation to the person harmed and the offence is murder even if the injury may not be generally fatal but is so only in his special case, provided the knowledge exists in relation to the particular person. If the element of knowledge be wanting the offence would not be murder but only culpable homicide not amounting to murder or even a lesser offence.

The third clause of section 300 views the matter from a general standpoint. It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The emphasis here is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and the causing of such injury is intended the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature. The sufficiency of an intentional injury to cause death in the ordinary way of nature is the gist of the clause irrespective of an intention to cause death. Here again the exceptions may bring down the offence to culpable homicide not amounting to murder.

The clause *Fourthly* comprehends generally the commission of imminently dangerous acts which must in all probability cause death or cause such bodily injury as is likely to cause death. When such an act is committed with the knowledge that death might be the probable result and without any excuse for incurring the risk of causing death or injury as is likely to cause death, the offence is murder. This clause, speaking generally, covers cases in which there is no intention to cause the death of any one in particular.

The word 'act' in all the clauses of section 299 or 300 denotes not only a single act but also a series of acts taken as a single act. When a number of persons participate in the commission of a criminal act the responsibility may be individual, that is to say, that each person may be guilty of different offence or all of them may be liable for the total result produced. This depends upon the intention and knowledge of the participants. The subject is then covered by sections 34, 35 and 38 of the Penal Code. Sections 34 and 35 create responsibility for the total result. Section 38 creates individual responsibility only. Section 34 applies where there is a common intention and for a criminal act done in furtherance of the common intention of all, everyone is equally responsible. Section 35 requires the existence of the knowledge or intent in each accused before he can be held liable if knowledge or intent is necessary to make the act criminal. Thus if two persons beat a third and one intends to cause his death and the other to cause only grievous injury and there is no common intention, their offences will be different. This would not be the case if the offence is committed with a common intention or each accused possessed the necessary intention or knowledge. Section 38 provides for different degrees of responsibility arising from the same criminal act.

In deciding whether a number of persons are guilty of murder under clause *thirdly* of section 300 read with section 34 one must look for a common intention that is to say some prior concert and what that common intention is. It is always a question of fact as to whether the accused shared a particular knowledge or intent. It is not necessary that there should be an appreciable passage of time between the formation of the intent and the act for common intention may be formed at any time. Next one must look for the requisite ingredient that the injuries which were intended to be caused were sufficient to cause death in the ordinary course of nature. Next it must be seen if the accused possessed the knowledge that the injuries they were intending to cause were sufficient in the ordinary course of nature to cause death. When these circumstances are found and death is in fact caused by such injuries the resulting offence of each participant is murder.

In the instant case the accused beat the deceased inside a house after dragging him there. The number of injuries shows that all the accused took part. His arms and legs were smashed and many bruises and lacerated wounds were caused on his person. The injuries intended were cumulatively, though not individually, sufficient in the ordinary course of nature to cause death. The assault was thus murderous and it must have been apparent to all the assaultants that the injuries they were inflicting in furtherance of the common intention of all were sufficient in the ordinary course of nature to cause death which is sufficient to bring the case under clause *thirdly* of section 300 read with section 34 of the Penal Code. In these circumstances it cannot be said that the offence committed by the accused was not murder but only culpable homicide not amounting to murder.

Appeal by Special Leave from the Judgment and Order, dated 12th April, 1963 of the Rajasthan High Court in D.B. Criminal Appeal No. 458 of 1962.

D. R. Prem, Senior Advocate (*O.P. Rana*, Advocate with him), for Appellants.

Brij Bans Kishore and *R. N. Sachthay*, Advocates, for Respondent.

The Judgment of the Court was delivered by :—

Hidayatullah, J.—The Appellants, who are four in number, have been convicted by the Rajasthan High Court under section 302 read with section 34 of the Indian Penal Code and sentenced to imprisonment for life. Previously they were convicted along with three others by the Sessions Judge, Merta, under section 302 but read with section 149 of the Code. On the acquittal of the others the change in the section was made. The appellants were charged in the alternative and no question of a new charge arises. Special Leave was granted to the appellants limited to the question whether section 302 read with section 34 was applicable to the facts of the case. At the hearing before us Mr. Prem claimed that under the leave he was entitled to argue that the offence disclosed by the evidence did not fall within section 302, Indian Penal Code, while Mr. Brij Bans Kishore contended that the only point on which leave was granted was whether section 34, Indian Penal Code, was properly invoked. In our opinion, leave was not granted on the latter point which does not present any difficulty at all but on the question whether the conviction for murder is justifiable.

The incident took place on 29th June, 1961, at about 5 or 5-30 A.M. at a village called Hindas. One Bherun, son of Girdhari Jat was assaulted by a number of persons

and received numerous injuries. He died as a result on the same day. Prosecution proved satisfactorily that Bherun and his father Girdhari were on inimical terms with the appellants and that certain criminal proceedings were going on between them. The prosecution further proved that Bherun had gone to Hindas with a servant to attend to his fields there. He was on his way to the fields, when he passed the house of Bhagu (one of the original accused but since acquitted) and was caught hold of by Anda (appellant No. 1) and Roopla (appellant No. 2) and was assaulted. They and the other accused dragged him inside the house and beat him severely. Bherun tried hard to avoid being dragged inside the house and clung desperately to the door jamb but Anda and Roopla struck him on his hands with their sticks to make him release his hold. His cries attracted the neighbours and one of them Moda (P.W 8) attempted a rescue but was beaten off. The evidence, proving the presence and participation of these appellants in the assault has been concurrently accepted by the High Court and the Sessions Judge and the findings on this part of the case must be considered as established. There can be no question that the appellants were actuated by a common intention which must have been the result of a prior concert, regard being had to the time, and the place and the circumstances of the visit of Bherun. Section 34, Indian Penal Code, as we shall show presently, was thus rightly invoked and that aspect of the case furnishes no difficulty whatever.

Bherun was examined by Mr. C. L. Sablok, Medical Officer-in-charge, Merta City Dispensary and he is witness No. 4 for the prosecution. Mr. Sablok found Bherun in great pain and sinking. He noted the injuries observed by him in his report (Exhibit P-1) which he was able to verify more fully when he performed the autopsy after Bherun's death. His second report is Exhibit P-2. The two examinations revealed the existence of over thirty wounds and injuries. There were fractures of the right and left ulnas, second and third metacarpal bones of the right hand and second metacarpal bone of the left hand, compound fractures of the right tibia and right fibula, the tibia being fractured at two places and fracture of the left fibula. These fractures lay under large bruises and lacerated wounds. Mr. Sablok could specify nine such bruises in addition to multiple bruises running in different directions on the right buttock which he was unable to count. There were as many as sixteen lacerated wounds on the arms and legs and a hematoma on the right forehead and a big bruise on the middle of the chest. When Bherun was admitted in the hospital he was bleeding profusely from his injuries and the right tibia which was fractured at two places was splintered and the broken ends were protruding. At the site of other injuries muscle tags were protruding out of the wounds. At the autopsy the lungs were pale and the heart empty which showed that enormous quantity of blood must have been lost. The opinion of Mr. Sablok on the cause of death was :

"In my opinion the cause of death is shock and syncope due to multiple injuries. *
* * * All these injuries collectively can be sufficient to cause death in the ordinary course of nature. But individually no injury was sufficient in the ordinary course of nature to cause death."

The argument of Mr. Prem is that the offence is not murder but culpable homicide not amounting to murder. He contends that this case cannot be brought under any of the clauses of section 300 which turn the lesser offence into murder. Mr. Brij Bans Kishore says that clauses (1) and (3) of section 300 apply to this case. The question thus is what offence was committed ?

The offence of culpable homicide is defined by section 299. It reads :—

"299. *Culpable Homicide*—

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that it is likely by such act to cause death, commits offence of culpable homicide."

The offence involves the doing of an act (which term includes illegal omissions) (a) with the intention of causing death or (b) with the intention of causing such bodily injury as is likely to cause death or (c) with the knowledge that the act is

likely to cause death. If death is caused in any of these three circumstances, the offence of culpable homicide is said to be committed. The existence of the three circumstances (a), (b) and (c) distinguishes homicide which is culpable from homicides which are lesser offences or which are excusable altogether. Intent and knowledge in the ingredients of the section postulate the existence of a positive mental attitude and this mental condition is the special *mens rea* necessary for the offence. The guilty intention in the first two conditions contemplate the intended death of the person harmed or the intentional causing of an injury likely to cause his death. The knowledge in the third condition contemplates knowledge of the likelihood of the death of the person.

Section 300 tells us when the offence is murder and when it is culpable homicide not amounting to murder. Section 300 begins by setting out the circumstances when culpable homicide turns into murder which is punishable under section 302 and the exceptions in the same section tell us when the offence is not murder but culpable homicide not amounting to murder punishable under section 304. Murder is an aggravated form of culpable homicide. The existence of one of four conditions turns culpable homicide into murder while the special exceptions reduce the offence of murder again to culpable homicide not amounting to murder. We are not concerned with the exceptions in this case and we need not refer to them. We now refer to the circumstances which turn culpable homicide into murder. They read :

"300. *Murder.*—

Except in the cases hereinafter excepted culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

Secondly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

Thirdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

Fourthly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid "

Taking the four clauses one by one we find that under the first clause of section 300 culpable homicide is murder when the act by which death is caused is done with the intention of causing death. This clause reproduces the first part of section 299. An intentional killing is always murder unless it comes within one of the special exceptions in section 300. If an exception applies, it is culpable homicide not amounting to murder. It is the presence of a special exception in a given case which reduces the offence of murder to culpable homicide not amounting to murder when the act by which death is caused is done with the intention of causing death.

The *Secondly* in section 300 mentions one special circumstance which renders culpable homicide into murder. Putting aside the exceptions in section 300 which reduce the offence of murder to culpable homicide not amounting to murder, culpable homicide is again murder if the offender does the act with the intention of causing such bodily injury which he knows to be likely to cause the death of the person to whom harm is caused. This knowledge must be in relation to the person harmed and the offence is murder even if the injury may not be generally fatal but is so only in his special case, provided the knowledge exists in relation to the particular person. If the element of knowledge be wanting the offence would not be murder but only culpable homicide not amounting to murder or even a lesser offence. Illustration (b) appended to this clause very clearly brings out the point. It reads :

"(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury, Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death."

The third clause views the matter from a general standpoint. It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The emphasis here is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and the causing of such injury is intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature. If the intended injury cannot be said to be sufficient in the ordinary course of nature to cause death, that is to say, the probability of death is not so high, the offence does not fall within murder but within culpable homicide not amounting to murder or something less. The *Illustration* appended to the clause *Thirdly* reads :

“(c) A, intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.”

The sufficiency of an intentional injury to cause death in the ordinary way of nature is the gist of the clause irrespective of an intention to cause death. Here again, the exceptions may bring down the offence to culpable homicide not amounting to murder.

The clause *Fourthly* comprehends generally the commission of imminently dangerous acts which must in all probability cause death or cause such bodily injury as is likely to cause death. When such an act is committed with the knowledge that death might be the probable result and without any excuse for incurring the risk of causing death or injury as is likely to cause death, the offence is murder. This clause, speaking generally, covers cases in which there is no intention to cause the death of any one in particular. *Illustration (d)* appended to this clause reads :

“(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.”

Now the word ‘act’ in all the clauses of section 299 or section 300 denotes not only a single act but also a series of acts taken as a single act. When a number of persons participate in the commission of a criminal act the responsibility may be individual, that is to say, that each person may be guilty of a different offence or all of them may be liable for the total result produced. This depends on the intention and knowledge of the participants. The subject is then covered by sections 34, 35 and 38 of the Code. They may be read at this stage :

“34. Acts done by several persons in furtherance of common intention.—

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

35 When such an act is criminal by reason of its being done with a criminal knowledge or intention.—

When an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

38. Persons concerned in criminal act may be guilty of different offences.—

Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.”

The first two sections create responsibility for the total result. The third creates individual responsibility only. Section 34 applies where there is a common intention and for a criminal act done in furtherance of the common intention of all, every one is equally responsible. Section 35 requires the existence of the knowledge or intent in each accused before he can be held liable if knowledge or intent is necessary to make the act criminal. Thus if two persons beat a third and one intends to cause his death and the other to cause only grievous injury and there is no common intention, their offences will be different. This would not be the case if the offence

is committed with a common intention or each accused possessed the necessary intention or knowledge. Section 38 provides for different degrees of responsibility arising from the same criminal act. The *Illustration* brings out the point quite clearly.

"A attacks Z under such circumstances of grave provocation that his killing of Z could be only culpable homicide not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide."

We may now apply these principles to the facts of the present case. In the present case the accused were obviously present at the spot by previous arrangement. The time and the place and the errand on which Bherun was engaged clearly show that they intended to waylay and beat Bherun. This intent was obviously shared and was the result of prior arrangement. The question is whether they can be brought within any one of the three clauses of section 300. The injuries were not on a vital part of the body and no weapon was used which can be described as specially dangerous. Only *lathis* were used. It cannot, therefore, be said safely that there was an intention to cause the death of Bherun within the first clause of section 300. At the same time, it is obvious that his hands and legs were smashed and numerous bruises and lacerated wounds were caused. The number of injuries shows that every one joined in beating him. It is also quite clear that the assailants aimed at breaking his arms and legs. Looking at the injuries caused to Bherun in furtherance of the common intention of all it is clear that the injuries intended to be caused were sufficient to cause his death in the ordinary course of nature even if it cannot be said that his death was intended. This is sufficient to bring the case within *Thirdly* of section 300.

Our attention was drawn to a decision of the Gujarat High Court reported in *Oswal Danji Tejsi and others v. State*¹. The accused there were convicted under section 325 read with section 34, Indian Penal Code. In that case twenty-one injuries were caused on the person of the victim of which only two injuries, which were caused with an iron-ringed stick, were fatal. There were three accused and only one such stick. The learned Judges observed :

"..... Having regard to the paucity of the number of fatal injuries, it could not be proper to say that the three accused persons were necessarily actuated with an intention of causing death of Rana".

It appears that the Assistant Government Pleader conceded that the common intention was not to commit murder and that the offence was culpable homicide not amounting to murder, which he said was the appropriate section to apply. The learned Judges did not agree but changed the conviction from section 325, Indian Penal Code to section 326, Indian Penal Code. The statement of the learned Judges which we have quoted from their judgment, with due respect, is not adequate. They seem to have considered the matter only from the view point of clause (1) of section 300.

We may refer to two cases of this Court. In *Brij Bhukhan and others v. The State of Uttar Pradesh*² there was no injury sufficient to cause death in the ordinary course of nature. It was, however, pointed out that it was open to the Court to look into the nature of the injuries and if they were cumulatively sufficient in the ordinary course of nature to cause death, clause *Thirdly* of section 300 was applicable. We have considered the matter from this point of view. In Criminal Appeal No. 1 of 1957 (*Chandgi and another v. The State of Punjab*) decided on 14th March, 1957, there was one serious injury which was inflicted with a *gandasi* and had all but severed the arm of the victim from his body. This Court did hold the accused not guilty under section 302/34, Indian Penal Code, observing :

"This injury may or may not be described as sufficient in the ordinary course of nature to cause death and curiously enough when the Doctor was examined before the learned Sessions Judge no

1, A.I.R. 1961 Guj. 16.

2, A.I.R. 1957 S.C. 474.

questions were addressed to him in this behalf. On the evidence as it stands it is impossible for us to come to the conclusion that the common intention of the appellants was to murder the deceased. The only conclusion to which we can come on the record is that the common intention of the appellants in pursuing the deceased was to cause him grievous hurt

The injury itself was not proved to be sufficient in the ordinary course of nature to cause death and, in our opinion, the case is distinguishable.

No case can, of course, be an authority on facts. In the last case inference was drawn from facts, which were different. It is always a question of fact as to whether the accused shared a particular knowledge or intent. One must look for a common intention, that is to say, some prior concert and what that common intention is. It is not necessary that there should be an appreciable passage of time between the formation of the intent and the act for common intention may be formed at any time. Next, one must look for the requisite ingredient that the injuries which were intended to be caused were sufficient to cause death in the ordinary course of nature. Next we must see if the accused possessed the knowledge that the injuries they were intending to cause were sufficient in the ordinary course of nature to cause death. When these circumstances are found and death is, in fact, caused by injuries which are intended to be caused and which are sufficient in the ordinary course of nature to cause death the resulting offence of each participant is murder.

In this case the accused beat Bherun inside a house after dragging him there. The number of injuries shows that all took part. His arms and legs were smashed and many bruises and lacerated wounds were caused on his person. The injuries intended to be caused were sufficient in the ordinary course of nature to cause death. The assault was thus murderous and it must have been apparent to all the assailants that the injuries they were inflicting in furtherance of the common intention of all were sufficient in the ordinary course of nature to cause death. In these circumstances it cannot be said that the offence was not murder but only culpable homicide not amounting to murder.

The appeal fails and is dismissed.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, M. Hidayatullah and V. Ramaswami, JJ.

Indra Kumar Karnani

.. *Appellant**

v.

Atul Chandra Patitundi and another

— *Respondents.*

West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950), section 13 (1) and (2)—Scope and construction—Sub-lease by tenant of first degree without consent of landlord and against the terms of the lease—Sub-lessee if can acquire rights mentioned in section 13 (2).

Section 13 (1) of the West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950) makes a distinction between the two classes of sub-tenancies, namely (i) sub-tenancy created by a tenant of the first degree and (ii) sub-tenancy created by a tenant inferior to the tenant of the first degree by which is meant a tenant holding immediately or mediately under a tenant of the first degree. So far as the second class of sub-tenancy is concerned, the sub-section enacts that the sub-letting will not be binding upon the landlord or on the tenant of the superior degree unless each of them has consented to the transaction of sub-lease. There is no express provision in section 13 (1) that a sub-lessee of the 1st class requires previous consent of the landlord or that in the absence of such consent the sub-lease shall not be binding upon the non-consenting landlord. Section, 3 (2) refers to both the classes of sub-leases and states that if the sub-lease has been made by a tenant of the first degree, the sub-lessee shall be deemed to be a tenant in respect of the premises demised to him if the tenancy

of such tenant is lawfully determined under the provisions of West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950) otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified in clause (h) of the proviso to section 12 (1). In the case of second class of sub-leases also the sub-lessee will acquire the status of a tenant as mentioned in section 13 (2), but in this class of sub-leases the rights of the tenant are conferred on the sub-lessee only if the sub-lease is binding upon the landlord. In enacting section 13 (1) and (2) the Legislature has deliberately made a distinction between the two classes of sub-tenancies and provided that in the case of sub-lease of the first class the sub-lessee will acquire the status of the tenant in respect of the premises demised, though the sub-lease is not binding upon the landlord according to the agreement of lease. The Legislature has further provided that in the case of sub-lease of the second class the sub-lessee will acquire the status of a tenant of the premises only if the sub-lease is binding upon the "landlord" as defined in section 13 (1). It follows that in the case of sub-letting by a tenant of the first degree no consent of the landlord to sub-letting is required as a condition precedent for acquisition by the sub-lessee of the tenant's right but in the case of sub-letting by a tenant inferior to the tenant of the first degree the consent of the landlord and also of the tenant of the superior degree above him to the sub-letting is necessary if the sub-lessee is to acquire the rights of the tenant contemplated by section 13 (2). Where therefore a tenant of the first degree sub-lets the premises, the sub-lessee will be entitled to the rights mentioned in section 13 (2) even if the sub-letting was against the terms of the lease.

Section 12 (1) (c) of the West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950) saves the right of sub-tenants even in a case in which the landlord has brought a suit for eviction against the tenant under that section and the rights and obligations of sub-tenants would be governed by the provisions of section 13.

The argument that the provisions of section 13 (2) of the West Bengal Act XVII of 1950 should be construed in the light of the language of section 11 (3) of West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII of 1948) is untenable. In enacting section 13 of the 1950 Act the Legislature has deliberately enlarged the class of sub-tenants to be protected from eviction by the landlords and the language of the section dealing with the sub-lessees has been deliberately changed and proper effect and interpretation must be given to the language of the new section.

Appeal by Special Leave from the Judgment and Decree dated 2nd June, 1959 of the Calcutta High Court in Appeal from Appellate Decree No. 536 of 1954.

S. Murthy and *B. P. Maheshwari*, Advocates for Appellant.

M. C. Chakraborty and *R. Gopalakrishnan*, Advocates for Respondent 1.

The Judgment of the Court was delivered by

Ramaswami, J.—The sole question for determination in this appeal is whether respondent No. 1 Atul Chandra Patitundi, is protected from being evicted by the landlord from the premises No. 90-A, Harish Mukerjee Road situated in Bhawanipur, District 24-Parganas in view of the provisions enacted in section 13 (2) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 (West Bengal Act (XVII of 1950), hereinafter called the 1950 Act.

Some time before 1948, respondent No. 2 was inducted as a monthly tenant under Rai Sahib Chandan Mal Inder Kumar, the predecessor-in-interest of the appellant. One of the conditions of the lease was that the tenant will not sub-let the premises or any portion thereof. As respondent No. 2 defaulted in the payment of rent the appellant made an application under section 14 of the Calcutta Rent Ordinance, 1946, for permission to sue him for eviction. The application was granted by the Second Additional Rent Controller on 10th September, 1948. On 1st December, 1948, the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948 (West Bengal Act XXXVIII of 1948), hereinafter called the 1948 Act, came into force. On 15th September, 1949, the appellant filed a Title Suit No. 171 of 1949 in the Court of the 1st Subordinate Judge, Alipore, 24-Parganas against respondent 2 for his eviction on the ground that the tenancy had been determined on account of default in payment of rent. While the suit was pending, the 1950 Act came into force on 31st March, 1950. The suit was eventually decreed in favour of the appellant on 25th February, 1951. The appellant took out execution proceedings being, Title Execution Case No. 39 of 1951 of the Court

of the First Sub-Judge, Alipore. The suit was resisted by respondent No. 1 who alleged that he had taken sub-tenancy from respondent No. 2. Respondent No. 1 also filed Title Suit No 578 of 1951 in the Court of Fourth Munsif at Alipore impleading the appellant and respondent No. 2 and praying for a declaration that on the termination of the tenancy of respondent No. 2, respondent No. 1 became a direct tenant of the appellant under section 13 (2) of the 1950 Act and that he was not liable to be evicted in the execution case. The suit was decreed in the Court of the Subordinate Judge and the decree was affirmed by the District Judge of 24-Parganas in Title Appeal No 157 of 1953. A Second Appeal was also dismissed by the Calcutta High Court on 2nd June, 1959.

On behalf of the appellant the argument put forward was that the sub-lease granted by respondent No. 2 in favour of respondent No. 1 was contrary to the agreement of lease and not binding upon the appellant. It was, therefore, submitted that the sub-lessee did not acquire the status of a tenant under section 13 (2) of the 1950 Act and the sub-lessee could not be deemed to be holding directly under the appellant within the meaning of that sub-section. The question at issue depends upon the proper interpretation of section 13 (2) of the 1950 Act which states :

"13 (2) Where any premises or any part thereof have been or has been sub-let by 'a tenant of the first degree' or by 'a tenant inferior to a tenant of the first degree', as defined in *Explanation* to sub-section (1), and the sub-lease is binding on the landlord of such last mentioned tenant, if the tenancy of such tenant in either case is lawfully determined otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified in clause (h) of the proviso to sub-section (1) of section 12, the sub-lessee shall be deemed to be a tenant in respect of such premises or part, as the case may be, holding directly under the landlord of the tenant whose tenancy has been determined, on terms and conditions on which the sub-lessee would have held under the tenant if the tenancy of the latter had not been so determined :

Provided that it shall be competent for the landlord, or any person deemed under this section to be a tenant holding directly under the landlord, to make an application to the Controller for fixing rent of the premises or part thereof in respect of which such person is so deemed to be a tenant and until the rent is fixed by the Controller on such application such person shall be liable to pay to the landlord the same rent as was payable by him in respect of the premises or part thereof, as the case may be, to the tenant before the tenancy of the tenant therein had been determined. The Controller in fixing the rent shall not determine such rent at the rate which is beyond the limit fixed by paragraph (4) of Schedule A. The rent so fixed shall be deemed to be the standard rent fixed under section 9."

Section 13 (1) is also relevant in this connection and it states :

"13 (1) Notwithstanding anything contained in this Act, or in any other law for the time being in force, if a tenant inferior to the tenant of the first degree sub-lets in whole or in part the premises let to him except with the consent of the landlord and of the tenant of a superior degree above him, such sub-lease shall not be binding on such non-consenting landlord, or on such non-consenting tenant."

Explanation—In this sub-section—

- (a) 'a tenant of the first degree' means a tenant who does not hold under any other tenant ;
- (b) 'a tenant inferior to the tenant of the first degree' means a tenant holding immediately or mediately under a tenant of the first degree ;
- (c) 'landlord' means the landlord of a tenant of the first degree."

It is manifest that section 13 (1) makes a distinction between the two classes of sub-tenancies, namely, (1) sub-tenancy created by a tenant of the first degree, and (2) sub-tenancy created by "a tenant inferior to the tenant of the first degree" by which is meant a tenant holding immediately or mediately under a tenant of the first degree. So far as the second class of sub-tenancy is concerned, the sub-section enacts that the sub-letting will not be binding upon the landlord or on the tenant of the superior degree unless each of them has consented to the transaction of sub-lease. There is no express provision in section 13 (1) that a sub-lease of the first class requires previous consent of the landlord or that in the absence of such consent the sub-lease shall not be binding upon the non-consenting landlord. Section 13 (2) refers to both the classes of sub-leases and states that if the sub-lease has been made by a tenant of the first degree, the sub-lessee shall be deemed to be a tenant in respect of the premises demised to him if the tenancy of such tenant is lawfully determined under the provisions of the Act otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified

in clause (h) of the proviso to sub-section (1) of section 12. In the case of second class of sub-leases, *i.e.*, sub-leases created by a tenant inferior to the tenant of the first degree also to the sub-lessee will acquire the status of a tenant as mentioned in the statute but in this class of sub-leases the rights of the tenant are conferred on the sub-lessee only if the sub-lease is binding upon the landlord. In enacting section 13 (1) and (2) of the 1950 Act the Legislature has deliberately made a distinction between the two classes of sub-tenancies and provided that in the case of sub-lease of the first class, namely, sub-leases created by a tenant of the first degree, the sub-lessee will acquire the status of the tenant in respect of the premises demised, though the sub-lease is not binding upon the landlord according to the agreement of lease. The Legislature has further provided that in the case of sub-lease of the second class the sub-lessee will acquire the status of a tenant of the premises only if the sub-lease is binding upon the "landlord" as defined in section 13 (1). It follows that in the case of sub-letting by a tenant of the first degree no consent of the landlord to sub-letting is required as a condition precedent for acquisition by the sub-lessee of the tenant's right but in the case of sub-letting by a tenant inferior to the tenant of the first degree the consent of the landlord and also of the tenant of the superior degree above him to the sub-letting is necessary if the sub-lessee is to acquire the rights of the tenant contemplated by section 13 (2). It was argued on behalf of the appellant that the clause "and the sub-lease is binding on the landlord of such last mentioned tenant" in section 13 (2) governs both classes of tenancies, namely, sub-tenancies created by "tenant of the first degree" and also by "a tenant inferior to the tenant of the first degree" as defined in section 13 (1). We do not consider that there is any justification for this argument. Having regard to the grammatical structure and the context of the clause it is obvious that it imposes a qualification only upon sub-tenancies of the second class. It was also submitted on behalf of the appellant that if a sub-lease is granted by the tenant of the first degree against the terms of the contract of lease the landlord is entitled under section 12 (1) (c) of the 1950 Act to bring a suit for eviction of the tenant and that in such a suit the tenant and the sub-lessees are both liable to be evicted from the premises in question. It was submitted, therefore, that the rights mentioned in section 13 (2) are conferred upon the sub-lessee only in a case where sub-letting is not in violation of the agreement for lease. In our opinion, there is no substance in this argument. Section 12 (1) (c) states :

"12. (1) Notwithstanding anything to the contrary in any other Act or law, no order or decree for the recovery of possession of any premises shall be made by any Court in favour of the landlord against a tenant, including a tenant whose lease has expired."

Provided that nothing in the sub-section, shall apply to any suit or decree for such recovery of possession,—

.....

(c) against a tenant who has sub-let the whole or a major portion of the premises for more than seven consecutive months :

Provided that if a tenant who has sub-let a major portion of the premises agree to possess as a tenant the portion of the premises not sub-let on payment of rent fixed by the Court, the Court shall pass a decree for ejectment from only a portion of the premises sub-let and fix proportionately fair rent for the portion kept in possession of such tenant, which portion shall thenceforth constitute premises under clause (8) of section 2 and the rent so fixed shall be deemed standard rent fixed under section 9, and the rights and obligations of the sub-tenants of the portion from which the tenant is ejected shall be the same as of sub-tenants under the provision of section 13, "

It is manifest that section 12 (1) (c) saves the right of sub-tenants even in a case in which the landlord has brought a suit for eviction against the tenant under section 12 (1) (c) and the rights and obligations of sub-tenants would be governed by the provisions of section 13. Counsel on behalf of the appellant also referred to the provisions of section 11 (3) of the 1948 Act which states :

"11. (3) Any person to whom any premises or any part thereof have been or has been lawfully sub-let by a tenant shall, where the interest of the tenant in such premises or part is lawfully determined otherwise than by virtue of a decree or order obtained by the landlord on any of the grounds specified in clause (f) of the proviso to sub-section (1), be deemed to be a tenant in respect of such

premises or part, as the case may be, holding directly under the landlord on the terms and conditions on which such person would have held under the tenant if the interest of the tenant had not been so determined.

.. .. .

It was pointed out that rights are conferred by the statute only upon sub-lessees to whom the premises have been "lawfully" sublet by a tenant. It was contended that though the 1948 Act was repealed and substituted by the 1950 Act, the provisions of section 13 (2) of the latter Act have to be construed in the context of the language of section 11 (3) of the 1948 Act. We are unable to accept this argument as correct. It is manifest that in enacting section 13 of the 1950 Act the Legislature has deliberately enlarged the class of sub-tenants to be protected from eviction by the landlords and the language of the section dealing with the sub-lessees has been deliberately changed and proper effect and interpretation must be given to the language of the new section.

For the reasons expressed, we hold that the suit of respondent No. 1 has been rightly decreed and this appeal must be dismissed with costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.

The State of Rajasthan and others

.. *Appellants**

v.

M/s. Harishanker Rajendrapal

.. *Respondent*

Rajasthan Minor Mineral Concession Rules (1955), Chapters IV (Rules 19 to 32) and V—Applicability of provisions of Chapter IV and thereby of rule 30 to grants of mining leases under Chapter V—Mining lease by auction from Government—Writ petition by lessee for direction to Government for renewal of lease for 5 years under rule 30—Court directing renewal of lease for 5 years with option for a second renewal for equivalent period—Legality of order—Relief granted if in excess of what was prayed for.

The provisions of Chapter IV, i.e., rules 19 to 32, of the Rajasthan Minor Mineral Concession Rules (1955) are applicable as far as possible to the grant of mining leases under Chapter V. Apart from the heading of Chapter IV being in general terms and so applicable to the grant of all mining leases by whatever process, a comparison of the provisions of rules in Chapter IV and those in Chapter V shows that all the incidents of a grant of a mining lease contemplated and provided for in Chapter IV are not provided for by Chapter V. This leads to the irresistible conclusion that matters not provided for by rules in Chapter V with regard to mining leases will be covered by the provisions relating to those matters in Chapter IV as these provisions deal with the essential incidents affecting grant of mining leases.

Thus, the provisions of rules 19, 26, 27, 29, 30 and 32 by their very nature must apply to the leases granted under Chapter V as they are expressed in general terms and can apply to all mining leases. Rules 20 to 23 and 28 do not apply at all while rule 24 applies only partially and rule 31, in view of the provisions of rules 33 and 34, applies only with suitable modifications. Rule 25 usually applies only to application for grant of mining leases and not to grant of mining leases under Chapter V.

Rule 30 deals with the period of the lease. This rule will apply to leases granted under Chapter V both because the rules under Chapter IV apply to such leases and because there is no corresponding rule in Chapter V. The word "may" in the main provision of this rule must mean "shall" and, make the provision mandatory. If the State Government had discretion to fix any period of the lease, the last portion of the main provision of rule 30 which requires the fixing of a period shorter than 5 years only when the applicant desires it, would be redundant. The period of the lease can be shorter than five years only when the applicant desires and not when the Government desires. Government must fix the period of the lease at 5 years in the absence of any expression of desire by the applicant for taking the lease for a shorter period.

The word "may" in the proviso to rule 30 should also be construed as "shall" so as to make it incumbent on the Government to extend the period of the lease if the lessee desires extension. Of course no question for the extension of the lease can arise if the lessee himself does not wish to have the lease for a further period. It is on account of this option existing in the lessee that the word "may" has been used in this context. The lessee has been given a further option to have the lease extended by another five years but such an option is to be respected only if he gives the guarantee referred to in the proviso to rule 30.

The first extension as well as the second under the proviso to rule 30 has to be for five years. Government has no option in that regard as well. (Reasons for this view, meaning of the expression "such extension" in the proviso to rule 30 and the time when the term about option for second extension is to be settled between the parties discussed in the judgment).

When a lessee takes a mining lease at an auction for an initial period of three years it will amount to the lessee expressing a desire for having the lease for that period and it will not be open for him to contend that the lease should first be extended for two years to bring in it conformity with the main part of rule 30 before renewing the lease under the proviso to rule 30.

Where a lessee of a mining lease from the Government makes a prayer in a writ petition for a direction to the Government for the renewal, after the expiry of the original period of the lease, for a period of 5 years under rule 30 and the High Court directs the Government to renew the lease for a period of 5 years from the expiry of the original lease with option to a further renewal, if so desired, by another 5 years subject to the conditions in the proviso to rule 30, it cannot be said that the High Court had given relief to the lessee in excess of what he had prayed for. Rule 30 itself requires extension of the lease with option in the lessee for obtaining another extension for an equivalent period. The above prayer therefore should be construed to include a prayer for an extension of 5 years with the necessary option. Even if the prayer was not so made the High Court would be competent to make the direction in accordance with the requirements of the proviso to rule 30.

Appeal from the Judgment and Order dated 1st August, 1961 of the Rajasthan High Court in Civil Writ No. 86 of 1960.

G. C. Kasliwal, Advocate-General for the State of Rajasthan and *M. M. Tiwari*, Senior Advocate (*K. K. Jain* and *R. N. Sachthy*, Advocates, with them) for Appellants.

Rameshwar Nath, *S. N. Andley* and *P. L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This appeal, on certificate granted by the Rajasthan High Court, raises the question of the applicability of the provisions of Chapter IV and thereby of rule 30 of the Rajasthan Minor Mineral Concession Rules, 1955, hereinafter called the Rules, to the grants of mining leases under the provisions of Chapter V of the Rules.

The facts leading to this appeal are briefly these. The respondent obtained the mining lease for extracting sand-stone from the mines in certain area from the Government of Rajasthan in 1956. The lease was granted as a result of auction. The period of the lease was from 1st April, 1956 to 31st July, 1959. The respondent applied for extension of the period upto two years in view of the mandatory nature of the main provision of rule 30 and simultaneously also applied for the renewal of the lease for a further period in accordance with the provisions of the proviso to rule 30. The first prayer was refused and the State Government extended the period of the lease at first by six months and later by another two months. The respondent thereafter filed a writ petition under Article 226 of the Constitution in the High Court and prayed for issue of a writ of *mandamus* directing the striking down of the order of the Government renewing the lease for 8 months and directing the State of Rajasthan further to extend the lease in the first instance for two years from 30th July, 1959 to bring it in conformity with the period of lease specified in rule 30 and to renew, after the expiry of such extended period, for a further period of 5 years under rule 30 of the Rules. The State of Rajasthan, appellant, contested the petition on the ground that the provisions of Chapter IV of the Rules did not apply to the grant of mining leases by auction or tender provided for by Chapter V of the Rules

and that in any case the initial period short of 5 years must be deemed to have been at the desire of the respondent and that any further extension of the period of the lease under the proviso was in the discretion of the Government and, consequently, the respondent could not claim to have the period of the lease extended for a period of 5 years.

The High Court held that the provisions of Chapter IV of the Rules were applicable as far as possible to the grant of mining leases by auction under Chapter V, that though the State Government had to give a lease for 5 years in view of rule 30, yet the shorter period of the lease in favour of the respondent must, in the circumstances be deemed to have been at his request and that the respondent was entitled to an extension of the lease by a further period of 5 years in accordance with the provisions of the proviso. It therefore directed the State Government to renew the lease for a period of 5 years from the expiry of the original lease with option of further renewal, if so desired, by another period of 5 years subject to the conditions mentioned in rule 30. It is against this order that this appeal has been filed.

Two questions are raised for the appellant in this Court. The first is that the provisions of Chapter IV of the Rules do not govern the grant of mining leases by auction under the provisions of Chapter V of the Rules. The other is that the proviso to rule 30 gives discretion to the State Government to extend the period of the lease for any period not exceeding 5 years and that it is not mandatory that the State Government must extend the lease by a period of 5 years as held by the High Court. We are of opinion that the High Court has come to a right conclusion on these two points.

Section 5 of the Mines and Minerals (Regulation and Development) Act, 1948 (LIII of 1948) empowered the Central Government to make Rules, by notification in the official Gazette, for regulating the grant of mining leases or for prohibiting the grant of such leases in respect of any mineral in any area. In the exercise of its power the Central Government framed the Mineral Concession Rules, 1949, hereinafter referred to as the Central Rules. Clause (ii) of rule 3 of the Central Rules defined 'minor mineral' to mean 'building stone' etc., which admittedly included sand-stone. Rule 4 stated that the Rules would not apply to minor minerals the extraction of which would be regulated by such Rules as the State Government might prescribe. The State of Rajasthan made the Rules in 1955 in the exercise of the powers conferred by rule 4 of the Central Rules.

Chapter IV of the Rules deals with grant of mining leases and consists of rules 19 to 32. Chapter V deals with grant of mining leases and royalty collection contract, by auction or by inviting tenders or by other methods and consists of rules 33 to 42. Apart from the heading of Chapter IV being in general terms and so applicable to the grant of all mining leases by whatever process, a comparison of the provisions of rules in Chapter IV and those in Chapter V shows that all the incidents of a grant of a mining lease contemplated and provided for in Chapter IV are not provided for by Chapter V. This leads to the irresistible conclusion that matters not provided for by rules in Chapter V with regard to mining leases will be covered by provisions relating to those matters in Chapter IV, as these provisions deal with the essential incidents affecting grant of mining leases.

We may therefore go through the provisions of Chapter IV to have a comprehensive view of what the rules provide and to see whether all of them are such that the Legislature could have intended their not applying to leases granted under Chapter V or whether they, by their nature, can apply to leases granted under Chapter IV only. Rule 19 deals with restrictions on grant of mining leases. There is no corresponding rule in Chapter V. It is inconceivable that the restrictions mentioned in rule 19 be not applicable to the grant of mining leases by auction or tender or any other method. The matters of substance are the contents of the lease the persons to whom the minerals about which leases can be granted and not the procedure to be followed in granting the lease. Chapter IV deals with the grant of mining leases on applications for such a grant. Chapter V mainly deals with grant of mining leases by auction or by inviting tenders or by other methods. It is clear

that the procedure to be followed for the grant of leases is left to the discretion of the Government though, ordinarily, in the absence of general or special order, the procedure laid down in Chapter IV is to be followed. Sub-rule (3) of rule 33 provides that leases by public auction or tender under sub-rule (1) shall be given only in such a case if the Government may, by general or special order, direct and rule 42 gives discretion to Government to adopt any other method for leasing out minor mineral deposits in the interest of industry and development of the deposit. The restrictions laid down by rule 19 are that no mining lease is to be granted in respect of any minor mineral notified by Government in that behalf, that no mining lease for the notified mineral will be granted to a person unless he holds a valid certificate of approval and that no mining lease shall be granted to an individual person unless he be a citizen of India except with the prior approval of Government. These restrictions are of a general nature and salutary in effect and the Legislature, in our view, could not have made them inapplicable to the grant of mining leases under the rules in Chapter V.

Rules 20 to 23 are applicable to applications for grant of mining leases. They mention the person to whom an application is to be made, the fee which is to accompany such application, what the application should contain and how priority is to be given if there be more than one application in respect of the same land. These rules cannot, by their nature, apply to the grant of mining leases by auction or tender or by any other method.

Rule 24 provides for the Register of Mining Leases. Most of the particulars to be noted in this Register relate to the grant of mining leases on application but some of the particulars could be entered with respect to the mining leases granted by following the other procedure and therefore its provisions can partially apply to the mining leases granted under Chapter V. Rule 25 will also usually apply to applications only as in the case of granting a mining lease otherwise, the Government would have ordinarily already decided the area for which the lease is to be given. Rule 26 lays down a restriction on the length and breadth of an area to be leased, but gives discretion to the Government to relax the provisions of the rule. This rule is of general application, subject to the discretion in the Government to relax its provisions and there is no reason why it would have been made inapplicable to mining leases granted under Chapter V. Rule 27 provides that the boundaries of the area covered by a mining lease shall run vertically down below the surface towards the centre of the earth. Such a specification of the boundaries of the area is very essential in connection with mining leases and the rule about it must apply to all mining leases granted under Chapter V.

Rule 28 deals with deposit of security and applies to applicants for mining leases and not to those who are to get leases under Chapter V. There is a specific provision for security under rule 37 (iv), in Chapter V.

Rule 29 deals with transfer of mining leases and provides that a lessee with the previous sanction of the Government and subject to certain conditions could transfer his lease or any right or interest therein. There is no corresponding rule in Chapter V. This indicates that rule 29 will apply to the transfer of mining leases granted under Chapter V. There is no good reason why such a lessee be deprived of his right to transfer or be free from any restriction laid down in rule 29. Rule 30 deals with the period of lease and is the rule which is to be considered by us.

Rule 31 lays down the conditions subject to which the mining lease is granted. This rule has 24 clauses dealing with various matters. It is clear from rule 41 in Chapter V dealing with the execution of lease that the terms and conditions mentioned in rule 31 would be included in the lease executed by the lessee to whom a mining lease is granted under Chapter V. Of course rule 41 provides that such terms and conditions would be so modified as might be necessary by reason of the provisions of rules 33 and 34.

Sub-rule (2) of rule 33 provides that in cases of grant of mining leases by auction or by inviting tenders, the annual dead-rent of the lease would be determined in the auction or by tender as the case may be and may exceed the rate given in the Second

Schedule to the Rules. Rule 34 deals with payment of royalty through the contractor for royalty collection. These provisions of rules 33 (2) and 34 would require modification in conditions (3) and (4) of rule 31.

It has been urged that the specific mention of rule 31 in rule 41 indicates that the other rules in Chapter IV are not applicable to the grant of mining leases under Chapter V. We do not agree and are of opinion that the specific mention of rule 31 is made in rule 41 in view of the fact that it was to apply with suitable modifications. Rules in Chapter IV which apply as they stand do require no specific mention for their applicability to the grant of mining leases under Chapter V:

Rule 32 deals with the currency of the lease and provides that the currency of the lease shall be from the date of communication to the party unless so otherwise stated, that the lessee shall have no right to continue work or to accumulate stock on or after the date of termination of the lease however unless otherwise sanctioned by Government and that all accumulated stock and immovable property left in the leased out area after the date of expiry of the lease shall be deemed to be Government property. The provisions of this rule are essential to define the currency of the mining lease granted under Chapter V and to the rights of the lessee and the State in regard to continuing the work after the date of termination of the lease or to the matter lying in the leased out area after the expiry of the lease. There is no corresponding rule in Chapter V. Rule 32 must be deemed to apply to the leases granted under Chapter V.

It would thus appear that the provisions of rules 19, 26, 27, 29 and 32, by their nature, must apply to the leases granted under Chapter V as they are expressed in general terms and can apply to all mining leases. If they were not intended to apply to mining leases granted under Chapter V, the Legislature would have made an express provision about it and would have also made some suitable corresponding provisions for the leases granted under Chapter V.

We are therefore of opinion that the contention that the rules under Chapter IV do not apply to mining leases granted under Chapter V is not sound and that the High Court rightly held that they do apply so far as applicable to mining leases granted under Chapter V.

Rule 30 deals with the period of lease. This rule will apply to leases granted under Chapter V both because the rules under Chapter IV apply to such leases and because there is no corresponding rule in Chapter V. Reference has been made to rules 38 and 39 in Chapter V which deal with certain payments if the period of lease is not more than 1 year or is more than one year respectively. The fixing of the period of the lease is an essential term of the lease. Rule 32 in Chapter IV provides when the lease is to commence. The lease should also provide the time when it should terminate. That can be done either by setting down the actual date or by expressing the period of the lease. Rules 38 and 39 provided for different matters. They apply when the period of the lease is already fixed under the terms of the lease and in accordance with the Rules.

The next matter to be considered is the construction of rule 30 which reads :

"Period of lease.—A mining lease may be granted for a period of 5 years unless the applicant himself desires a shorter period :

Provided that the period may be extended by the Government for another period not exceeding 5 years with option to the lessee for renewal for another equivalent period, in case the lessee guarantees investments in machinery, equipments and the like, at least to the tune of 20 times the value of annual dead-rent within 3 years from the grant of such extension. The value of the machinery, equipment and the like shall be determined by the Government. Where the lease is so renewed, the dead-rent and the surface rent shall be fixed by the Government within the limits given in the Second Schedule to these Rules, and shall in no case exceed twice the original dead rent and surface rent respectively, and the royalty shall be charged at the rate in force at the time of renewal."

It is urged for the appellant that the State Government has discretion to fix the initial period of the lease as well as to fix the period of the extension of the lease after the expiry of the initial period. The High Court did not agree with this submission of the State and, we think, rightly.

The word 'may' in the main provision of the rule must mean 'shall' and make the provision mandatory. This is obvious from the last portion of the provision. If the State Government had discretion to fix any period of the lease, the last portion of the provision would be redundant. The Government could fix the period of the lease at any period shorter than five years. But the provision requires the fixing of a period shorter than 5 years only when the applicant desires a shorter period. The period of the lease therefore can be shorter than five years only when the applicant desires and not when the Government desires. Government must fix the period of the lease at 5 years in the absence of any expression of desire by the applicant for taking the lease for a shorter period.

The word 'may' in the proviso in regard to the extension of the period by Government should also be construed as 'shall', so as to make it incumbent on Government to extend the period of the lease if the lessee desires extension. Of course no question for the extension of the lease can arise if the lessee himself does not wish to have lease for a further period. It is on account of this option existing in the lessee that the word 'may' has been used in this context. The lessee has been given a further option to have the lease extended by another five years but such an option is to be respected only if he gives the guarantee referred to in the proviso. If he is not prepared to give such a guarantee, he cannot exercise the option for the extension of the lease and the lease must automatically expire at the end of the first extended period.

The first extension has to be for five years. Government has no option in that regard as well. This appears from what is provided in connection with the option of the lessee for a second extension. The second extension, at his option, is to be for a period equivalent to the period of the first extension. The guarantee to be given is to the effect that the lessee would invest in machinery etc., at least to the tune of 20 times the value of the annual dead-rent within 3 years from the grant of such extension. There is no point in taking a guarantee to make certain investments within three years if the second extended period of the lease is of a shorter duration as it can be if Government has a discretion in granting extension for a period shorter than 5 years. If the first extension be for less than three years the second extension cannot be for a longer period. If the expression 'such extension' refers to the extension on the exercise of the option of the lessee at the end of the first extension, it would be a preferable construction of the proviso to hold that the Government is bound to extend the period of the lease for five years at the expiry of the initial period of the lease and that the lessee will have the option for renewal of the lease for another five years in case he guarantees the requisite investment as mentioned in the proviso. Another way of looking at the provision—and a better way—is that the expression 'such extension' refers to the first extension which the Government grants at the expiry of the initial term of the lease. This means that at the time of granting the first extension the lessee has to choose whether he should also ask for the option for a second extension. The option would then be an integral part of the agreement about the first extension. This is also indicated from the language of the proviso linking the period of extension with the option for renewal of the lease for an equivalent period. If no option as such is given at the time and is not a term of the lease, the lessee may not be able to ask for a second extension at the end of the first extended period of the lease. When he secures the exercise of such an option as a term of the lease, he has to guarantee that within the first three years of the extended period of the lease he will make the heavy investment mentioned in the proviso with the resultant confidence that he will have undisturbed lessee rights for a period of 10 years from the expiry of the initial term of the lease. Whichever construction be put, with respect to the time when the term about option is to be settled between the parties it must follow that the period of the first extension must be five years and not less.

We are further of opinion that the High Court is right in holding that the respondent's taking the lease for a period upto 31st July, 1959 must amount to his expressing a desire for having a lease for that period. If he did not so desire, he need not bid and taken the lease for the period for which it was to be given by auction.

It has been argued for the State that the High Court granted relief to the respondent in excess of what he had prayed, inasmuch as the High Court had directed the Government to renew the respondent's first lease for a period of 5 years with option to further renewal if so desired for another period of 5 years subject to the condition mentioned in rule 30 when the respondent had not prayed for any direction with respect to the option for a second extension of the lease. The contention is not sound. The relief claimed after the expiry of the period of the first lease, which, according to the respondent, was also to be extended by two years, reads :

"and then, after the expiry of the period of five years the lease be renewed for a period of five years under rule 30 of Rajasthan Minor Mineral Concession Rules, 1955 "

The renewal was to be under rule 30. Rule 30 itself requires extension of the lease with option in the lessee for obtaining another extension for an equivalent period. This option must be a term of the lease and therefore must be incorporated in the lease at the time when the first extension is granted. The prayer therefore should be deemed to include a prayer for an extension of 5 years with the necessary option. Even if the prayer was not so made, the High Court was competent to make the direction in accordance with the requirements of the proviso to rule 30. The direction for renewal is, in our view, in full accordance with what the proviso requires.

The result is that the appeal fails and is dismissed with costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

South Asia Industries Private, Ltd.

*Appellant**

v.

S. Sarup Singh and others

Respondents.

Delhi Rent Control Act (LIX of 1958), section 14 (1), Proviso paragraph (b)—Application for eviction on the ground of tenant assigning the premises without consent of landlord—Tenant (Company) going into liquidation—Eviction order—If could be made against the assignee.

By majority (Mudholkar, J. holding contra)—Under paragraph (b) of proviso to section 14 (1) of Delhi Rent Control Act, 1958, assignment of the premises by the tenant is a ground of eviction of both the assigning tenant and the assignee, and in the event of an assignment without the consent in writing of the landlord, the Controller has jurisdiction to make an order for possession not only against the assigning tenant and but also against the assignee. Though the assigning tenant—a company—had gone into liquidation and ceased to be a party to the proceedings an order for eviction could be made against the assignee.

The consent contemplated by section 14 (1) proviso, paragraph (b) is a direct consent to the contemplated assignment to the particular assignee.

"Appeal by Special Leave from the Judgment and Order dated 10th May, 1963 of the Punjab High Court (Circuit Bench) at Delhi in S.A.O. No. 40-D of 1963.

C. B. Agarwala, Senior Advocate (*B. R. L. Iyengar, P. N. Chaddha, S. K. Mehta and K. L. Mehta*, Advocates, with him), for Appellant.

S. T. Desai, Senior Advocate (*Gopal Singh*, Advocate for *Harbans Singh*, Advocate, with him), for Respondents 1 and 2.

Gurcharan Singh, Advocate and *Gopal Singh*, Advocate for *Harbans Singh*, Advocate, for Respondents 3 to 5.

The Court delivered the following judgments :

Sarkar, J.—The respondents are the owners of certain premises in Connaught Circus in New Delhi, which were let out to Allen Berry & Co. (Calcutta), Ltd.

Sometime in 1959 Allen Berry & Co., transferred the lease to the appellant and put the latter in possession. Allying that the transfer had been made without their consent, the respondents made an application under clause (b) of the proviso to sub-section (1) of section 14 of the Delhi Rent Control Act, 1958, to the Controller appointed under it against Allen Berry & Co. and the appellant for an order for recovery of possession of the premises from them. While the application was pending, Allen Berry & Co. went into liquidation and was in due course dissolved and its name was, thereupon, struck off from the records of the proceedings. The Controller later heard the application and made an order in favour of the respondents for recovery of possession of the premises from the appellant also. An appeal by the appellant to the Rent Control Tribunal under the Act against this order was dismissed. The appellant then moved the High Court of Punjab for setting aside the order of the Tribunal, but there also it was unsuccessful. It has now come to this Court in further appeal.

It was contended that the order for recovery of possession made against the appellant after Allen Berry & Co., had ceased to be a party to the proceedings, was incompetent. This contention was based on an interpretation of the terms of sub-section (1) of section 14, material part of which is set out below :

Section 14.—(1) Notwithstanding anything to the contrary in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any Court or Controller in favour of the landlord against a tenant ;

Provided that the Controller may, on an application made to him in the prescribed manner make an order for the recovery of possession of the premises on one or more of the following grounds, only, namely :—

(a)

(b) that the tenant has, on or after the 9th day of June, 1952, sub-let, assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord.

The contention of the appellant was put in this way : The first part of sub-section (1) of section 14 puts a complete ban on recovery of possession from all tenants. The proviso to it is only an excepting clause and it lifts that ban in the circumstances mentioned in it. It follows that the proviso, though it does not expressly mention tenants, permits orders for recovery of possession against them alone. The tenant in clause (b) of the proviso means only the tenant sought to be evicted under the proviso such tenant having also to be by the express terms of the clause, a tenant who has assigned his tenancy. This follows from the use of the article " the " before the word " tenant " there. Therefore the only person against whom an order for recovery of possession can be made under clause (b) of the proviso to sub-section (1) of section 14 is the tenant who has assigned his tenancy. No such order can, hence, be made against the person to whom the tenancy has been assigned. As the appellant was such a person, no order for eviction could be made against it. I wish to observe at once that if this contention is correct—which I do not think it is—then the order could never be made against the appellant and the fact that Allen Berry & Co. ceased to be a party to the proceedings made no difference in this regard.

The argument of the appellant is really based on the article " the " prefixed to the word "tenant" in clause (b) of the proviso. It is said that the article clearly indicates that the only person against whom an order for ejection can be made under clause (b) is the tenant who assigns or sub-lets or parts with possession of the tenancy without the landlord's consent. I am unable to accept this argument. The proviso expressly states that an order for ejection can be made " on one or more of the following grounds " and then sets out the grounds in the different clauses that follow, one of which is clause (b) with which we are concerned. The clauses, therefore, set out the circumstances in which the operative part of the proviso is set in motion, that is, the circumstances in which an order for recovery of possession may be made. If this is so, as I think it is, the clauses could not have been intended to indicate the person against whom an order for recovery of possession could be made. Their purpose was entirely different. I am not suggesting that an order for recovery of possession against the assigning tenant cannot be made. All that I say is that the clauses do not intend to indicate the persons against whom an order

for recovery of possession can be made and so it cannot be argued that the order cannot be made against any other person.

Now the article "the" appears to me to have been used to show that the tenant assigning must be the tenant of the landlord seeking eviction. So read, the effect of the proviso in clause (b) is that a landlord can recover possession if *his* tenant has assigned, sub-let or transferred possession without his consent. This would be the natural reading of the provision and would carry out the intention of the Act. If this is not the correct reading of the provision, the situation would be anomalous. As the word "tenant" includes by virtue of its definition in section 2 (1), a sub-tenant, it would at least be arguable that clause (b) authorised a superior landlord to recover possession when the sub-tenant assigned without his consent. That could not possibly have been intended for the intermediate tenant would then have lost his tenancy for no fault of his. Therefore, I think the article "the" was used only to emphasize that the tenant assigning must be the tenant of the landlord seeking eviction. The article "the" does not, in my opinion, lead inevitably to the conclusion that the only person against whom an order for recovery of possession can be made on the ground mentioned in clause (b) is the tenant assigning or sub-letting or parting with possession of his tenancy without the landlord's consent.

I think there are good reasons why it must be held that the Act contemplated orders for recovery of possession also against persons other than a tenant who has assigned or sub-let without the landlord's consent. The offending tenant must of course go for, as I have said, he is the immediate tenant of the landlord desiring to recover possession and if he remains he would be entitled to possession and the landlord cannot recover possession. But this does not mean that the order may not also direct the removal from possession of others along with the immediate tenant when there is one. The reason for this view I will presently state. If I am right in what I have said, it will follow that in a case like the present where the tenant becomes extinct without leaving any successor on whom the tenancy devolves, an order can be made against a person who took an assignment of the lease from the tenant before it became extinct.

It is trite saying that the object of interpreting a statute is to ascertain the intention of the Legislature enacting it. When I enquire about the intention behind this statute, I find that far from lending any support to the appellant's contention it tends quite the other way. First, I observe that the object of the first part of sub-section (1) of section 14 is to ban all recovery of possession of tenanted premises by a landlord and that of the proviso is to lift that ban in specified cases. The object of the proviso is then to enable the landlord to recover possession in any of the specified cases. Assume that the present is a case where the landlord became entitled to recover possession under clause (b) of the proviso; clearly then the statute intended the landlord to recover possession. It would be our duty to give effect to that intention, unless the language used made it plainly impossible. I have earlier said that the language used does not compel the view that the only person against whom an order for recovery of possession can be made is the tenant assigning or sub-letting without the landlord's consent. That being so, orders against all "persons in occupation" must have been contemplated so that the landlord might without further trouble recover possession. Further I find it impossible to hold that the language used indicates an intention that when a right has accrued to a landlord to recover possession, that right would be taken away from him when the tenant assigning has become extinct without leaving a successor, an event which is only accidental and certainly rare. A Court would be fully justified in holding that in such a case it was intended that an order for recovery of possession can be made against the assignee alone for that would enable the object of the statute which was to enable the landlord to recover possession, to be achieved. An interpretation which defeats the object of a statute is, of course, not permissible.

Then, looking at section 18 of the Act I find that it clearly contemplates an order for recovery of possession under section 14 against a sub-tenant. It says, "Where an order for eviction in respect of any premises is made under section 14

against a tenant but not *against a sub-tenant* referred to in section 17", then in the circumstances mentioned, the sub-tenant shall be deemed to become a direct tenant under the landlord. This section plainly implies that an order for recovery of possession against a sub-tenant is contemplated by clause (b) of the proviso to sub-section (1) of section 14. The appellant's argument to the contrary cannot be sustained against the clear implication of the Act. If section 14 contemplates an eviction order against a sub-tenant, it must equally contemplate such an order against assignees of tenants, for the section makes no distinction between sub-tenants and assignees for the purpose of making such orders.

I am not unmindful of the fact that where an order for recovery of possession of any premises is made under section 14 against a tenant assigning or sub-letting without the landlord's consent, that order would under section 25 of the Act be binding on all persons in occupation of the premises except those who have independent title to them. This section does not however say that an order for recovery of possession against an assignee of a lessee cannot be made. It would not, therefore, support an argument that it was not intended that an order for recovery of possession could be made under section 14 against an assignee or a sub-tenant. On the other hand, it seems to me that to an application under clause (b) of the proviso to sub-section (1) of section 14 an assignee or sub-tenant, as the case may be, should be a proper party. Under this provision an ejectment order can be made only when the assignment or sub-letting was without the consent of the landlord. If it was with such consent, the assignee or the sub-tenant would be protected by the Act. An assignee or a sub-tenant is, therefore, interested in showing that there was the requisite consent. They should hence be entitled to be made parties to the proceedings. Otherwise, if under section 25 an eviction order obtained against the direct tenant is binding on them, they would be liable to be condemned without a hearing. It is no argument against this view that the direct tenant would protect them, for they cannot be made to depend on him for the protection of their rights. The direct tenant may be negligent or incompetent in his defence; he may even collude with the landlord or he may just not bother. If the assignee or the sub-tenant is thus entitled to be heard to oppose the order for eviction, that would be another reason for saying that an order for eviction could be made against them also; if they could oppose the making of the order, it would be unnatural to say that the order could not be made against them. In what I have said in this paragraph, I do not wish to be understood as holding that in view of section 25 an order for eviction against a tenant is in fact binding on his assignee or sub-tenant. Such a decision is not necessary for this case. I wish, however, to point out that if section 25 does not make the ejectment order so binding, the appellant cannot resort to it for any assistance.

I have now dealt with the first argument in support of the appeal and I find it unacceptable. The other argument was that the order for recovery of possession was unwarranted as in fact there had been a consent of the respondents to the assignment in favour of the appellant. It is said that the consent was given by a clause in the lease under which Allen Berry & Co. held which reads as follows:

"That whenever such an interpretation would be necessary in order to give the fullest scope and effect legally possible to any covenant or contract herein contained, the expression '*The Lessor*,' hereinafter used shall include his heirs, executors, administrators and assigns and the expression '*The Lessee*' hereinafter used shall include their representatives and assigns."

I am unable to accept this contention also.

I notice that the lease gave no express right to the lessee to assign with or without the consent of the lessor. The lessee no doubt had that right under the Transfer of Property Act. It may be that under the clause the lessee's assignee would be included in the expression "lessee" as used in the lease; that is the entire effect of the clause. But this would be so whether the lessor had consented to the assignment or not. Therefore, this clause does not lead to the conclusion that the lessor had consented to the assignment. It is of no assistance in the present case. I am also inclined to the view that the consent contemplated by section 14 (1), proviso (b)

is a direct consent to a contemplated assignment to a particular assignee : see *Regional Properties, Ltd. v. Frankenschwerth*¹. Clearly the clause in the case relied upon could not be a consent of this kind. This point, therefore, also fails.

For these reasons I would dismiss the appeal with costs.

Mudholkar, J.—In this appeal by certificate granted by the Punjab High Court an unusual question arises for consideration. That question is whether an application made under section 14 (1) (b) of the Delhi Rent Control Act, 1958, by a landlord of a building in Delhi against a tenant who happens to be a company incorporated under the Indian Companies Act, cannot be proceeded with and granted on the ground that before the making of any order thereon by the Rent Controller the Company is dissolved and is struck off the record of the case. According to the appellant who claims to be an assignee from the original tenant, that is, the Company, such an application cannot be proceeded with and granted while according to the respondent-landlord the fact that the company is dissolved makes no difference.

The facts which are not in dispute and which have been stated in the judgment of Bachawat, J., need not be recapitulated because what I have already said is sufficient to enable me to deal with the point.

The relevant part of section 14 (1) reads thus :

“Notwithstanding anything to the contrary contained in any other law or contract no order or decree for the recovery of possession of any premises shall be made by any Court or Controller in favour of the landlord against a tenant :

Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds only, namely :—

* * * * *

(b) that the tenant has, on or after the 9th day of June, 1952, sub-let, assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord ;

* * * * *

It is not necessary to refer to clause (a) or to the several clauses following clause (b) in this sub-section or to any of the sub-sections of section 14. Looking at sub-section (1) what we find is that it enacts a bar to the making of an order or decree for the recovery of possession of any premises by any Court or the Controller against a tenant. In other words the jurisdiction of a civil Court or even of the Rent Controller to make an order of eviction against the tenant is taken away. The proviso, however, lifts the ban against eviction in certain circumstances one of which is that set out in clause (b). What is important to bear in mind is that sub-section (1) is intended to protect the possession of the tenant. A proviso to a section or a sub-section is subservient to the main provision. It would, therefore, follow that the ban against the eviction is lifted only with respect to the possession of the tenant and not of any other person. In so far as persons other than the tenant who may be in possession of the premises which pertain to the tenancy is concerned, the matter is dealt with by section 25 and we can leave that out at any rate for the present. Another thing to be noticed about section 14 is that though under section 2 (1) (b) of the Act the word “tenant” includes several other persons in addition to the one with whom there was a contract that expression must be regarded as relating to the same individual in the entire section or at least in sub-section (1) of section 14 wherever it occurs. Thus, if in the first part of sub-section (1) of section 14 “tenant” is regarded as meaning an “assignee” of the tenant then it would have to be given the same meaning in clause (b) of sub-section (1) of section 14. That is to say that if there is a sub-letting or a further assignment or any other kind of parting with possession by an assignee of the original tenant (the assignment by the original tenant having been accepted or acquiesced in by the landlord) such

assignee can be evicted by the landlord if the action of the assignee of the kind mentioned was taken by him without his written consent.

Now, since sub-section (1) is a bar to the jurisdiction of the Rent Controller to make an order or decree for recovery of possession against a tenant it must necessarily follow that the tenant must be a party to a proceeding before him right up to the date of the making of the decree or order. Thus, if the tenant dies during the pendency of the proceedings and his legal representative is not substituted on the record in his place, the proceeding will abate against him and the Rent Controller will have no jurisdiction to make an order in favour of the landlord. That is to say, the proviso will not be available to the landlord no matter what the tenant had done if the records of the proceeding became defective because neither the tenant nor his legal representative was any longer a party to those proceedings. The reason for this is that the ground upon which the landlord's application is based can be availed of for lifting the ban on the eviction by the Rent Controller of the tenant alone. Unless an order is obtained against the tenant there would be no occasion for pressing in aid the provisions of section 25 of the Act. Where during the pendency of the proceedings before the Rent Controller the tenant dies or makes an assignment of whatever interest he may still have left in the demised premises no difficulty would arise because his legal representative or assignee could be brought on record in his place. But, it must be admitted, that an anomalous position results where the tenant happening to be a company is dissolved during the pendency of the proceedings and can, therefore, be not represented by any person. The Act does not contemplate this position nor even does the Code of Civil Procedure and so we have it that the defect in the record resulting from the dissolution of a company cannot be removed at all. The result, however, of this is that the jurisdiction of the Controller to proceed with the application of the landlord and therefore to make eventually an order or decree entitling the landlord to recover possession from the tenant ceases to be exercisable. Apparently this curious position arises because of a lacuna in the law. Such a lacuna cannot be removed by the Courts without assuming the power to legislate—which obviously is beyond the competence of any Court. The duty of Courts is merely to administer the law as they find it. The only way for remedying the defect is for the Legislature to step in and amend the law.

The result of what has happened in this case is that the right which the landlord possessed to evict the now defunct company from the premises through the intervention of the Rent Controller because the company had assigned the demised premises to another without his consent can no longer be availed of by him. The assignee, who is the appellant before us, can therefore continue to be in possession of the premises even though he may have been liable to be evicted with the aid of section 25 had the company not been dissolved in the meanwhile. Whether the landlord has now a right under the general law to evict the appellant is not a matter upon which I would express an opinion because it does not strictly arise at this stage. For these reasons I would allow the appeal, set aside the orders of the Courts below and dismiss the application of the respondent-landlord under section 14 (1) (b) of the Act. In the particular circumstances of the case I would direct that costs throughout shall be borne by the parties as incurred.

Bachawat, J.—Originally one Amar Sarup owned the land and building at plot No. 5, Block 'M' Connaught Circus, New Delhi. By a lease dated 1st March, 1956, Amar Sarup leased the property to Allen Berry & Co. (Calcutta) Ltd. (hereinafter referred to as the tenant) for a period of five years on a monthly rent of Rs. 297. Sometime thereafter, Amar Sarup transferred the property to the respondents. In or about May, 1959, the tenant assigned the tenancy rights, and parted with possession of the whole of the premises to the appellant. On 6th October, 1959, the respondents filed an application before the Rent Controller, Delhi, praying for eviction of the tenant and the appellant. The tenant, a limited company, had gone into voluntary liquidation on 26th September, 1959, and it was finally wound up and dissolved on 29th October, 1960. On its dissolution, the tenant ceased to exist, and by

order of the Rent Controller, its name was struck off from the array of parties in the pending application. By an order dated 10th October, 1962, the Rent Controller passed an order of eviction against the appellant. An appeal by the appellant to the Rent Control Tribunal, Delhi, was dismissed on 23rd January, 1963, and a Second Appeal to the Punjab High Court was dismissed on 10th May, 1963. A Letters Patent Appeal from the order dated 10th May, 1963, was dismissed on 11th December, 1963, on the ground that the appeal was not maintainable, and an appeal to this Court from the last order was dismissed on 18th January, 1963. The appellant has now preferred this appeal from the order dated 10th May, 1963 by Special Leave granted by this Court.

The respondents-landlords instituted the proceedings for eviction of the tenant and its assignee relying on the provisions of section 14 (1) of the Delhi Rent Control Act, 1958 (LIX of 1958) the relevant portion of which is as follows :

" 14 (1) Notwithstanding anything to the contrary contained in any other law or contract no order or decree for the recovery of possession of any premises shall be made by any Court or Controller in favour of the landlord against a tenant, :-

Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds, namely :—

* * * * *

(b) that the tenant has, on or after the 9th day of June, 1962 sub-let, assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord : "

The case of the landlords is that " the tenant has.....assigned.....the whole of the premises without obtaining the consent in writing of the landlord ", and, therefore, the Controller had jurisdiction to make an order for possession. The tenant is forbidden by section 16 (3) (b) of the Act to make the assignment, for contravention of section 16 (3) (b) he is punishable with fine under section 48 (2), and the assignment is a ground for eviction under section 14 (1), proviso, paragraph (b), and so, the landlords submit that the Controller had jurisdiction to make the order for possession against the tenant and its assignee, and on the dissolution of the tenant, against the assignee alone.

Counsel for the appellant contended that the Controller had no jurisdiction to make the order for possession in the absence of the original tenant. I cannot accept this submission. Both the tenant and the assignee were properly parties to the proceedings for possession, and if the tenant-company had not been dissolved, the Controller would have been competent to make the order for possession. The tenant has since been dissolved and ceased to exist, no one can be substituted in its place, and I do not see why the proceedings cannot now continue against the assignee alone. Paragraph (b) of the proviso to section 14 (1) evidently contemplates proceedings for possession against both the tenant and the assignee, who as a result of the assignment has been put in possession of the premises. Counsel for the appellant made the alternative submission that paragraph (b) contemplates an assignment by the tenant against whom the order for eviction is made, and as the appellant was the assignee and not the assignor, there was no ground for its eviction under paragraph (b). It is true that other paragraphs of the proviso contemplate the eviction of the tenant on the ground of some act on the part of the tenant against whom the proceeding for possession is brought, but under paragraph (b), the assignment is a ground of eviction of both the assigning tenant and the assignee, and in the event of an assignment without the consent in writing of the landlord, the Controller has jurisdiction to make an order for possession not only against the assigning tenant but also against the assignee.

Counsel for the appellant next referred us to clause 7 of the lease, which is in these terms :

"That, whenever such an interpretation would be necessary in order to give the fullest scope and effect legally possible to any covenant or contract herein contained, the expression 'The Lessor,' hereinbefore used shall include his heirs, executors, administrators and assigns and the expression 'The Lessee' hereinbefore used shall include their representatives and assigns."

Counsel for the appellant submitted that by clause 7 of the lease, the landlords have given their consent in writing to the assignment. I cannot accept this submission. The consent in writing within the meaning of paragraph (b) of the proviso to section 14 (1) may be either general or special, but no such consent was given by clause 7. The effect of clause 7 is that the assignee of the lease enjoys the benefits and is subject to the burden of the covenants in the lease, but the clause does not amount to consent by the landlord to an assignment either expressly or by necessary implication. The assignment to the appellant was without the consent in writing of the respondents. The Controller rightly passed the order for possession of the premises.

Counsel for the appellant contended that the contractual term of the lease not having expired on 6th October, 1959, the proceeding before the Controller was not maintainable. We indicated in the course of the argument that this contention not having been raised in the Courts below, we are not inclined to allow the appellant to raise it here for the first time.

In the result, the appeal is dismissed with costs.

ORDER OF THE COURT.—In accordance with the opinion of the majority, the appeal is dismissed with costs. The appellant will have a month's time from today to vacate the premises.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA. (Criminal Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND R. S. BACHAWAT, JJ:

Aghnoo Nagesia

.. Appellant*

-v.

The State of Bihar

.. Respondent.]

Evidence Act (I of 1872), section 25—First information report by accused admitting offence—Admissibility in evidence.

If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by section 25 of the Evidence Act. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of section 25 is lifted by section 27. Save and except the formal part identifying the accused as the maker of the report, no part of the confessional first information report could be tendered in evidence.

The entire evidence against the accused namely, the discovery of the dead body of the victim and of the weapon used from the place where it was concealed in consequence of the information, is not sufficient to convict the accused under section 302, Indian Penal Code.

Appeal by Special Leave from the Judgment and Order dated 9th November, 1964 of the Patna High Court in Criminal Appeal No. 200 of 1964 and Death Reference No. 9 of 1964.

K. K. Jain, Advocate (at State expense), for Appellant.

S. P. Varma and R. N. Sachthey, Advocates, for Respondent.

The Judgment of the Court was delivered by

Bachawat, J.—The appellant was charged under section 302 of the Indian Penal Code, for murdering his aunt, Ratni, her daughter, Chamin, her son-in-law, Somra and Dilu, son of Somra. He was convicted and sentenced to death by the Judicial Commissioner of Chotanagpur. The High Court of Patna accepted the Death Reference, confirmed the conviction and sentence and dismissed the appeal preferred by the appellant. The appellant now appeals to this Court by Special Leave.

The prosecution case is that on 11th August, 1963, between 7 A.M. and 8 A.M. the appellant murdered Somra in a forest known as Dungijharan Hills and later

Chamin in Kesari Garha field and then Ratni and Dilu in the house of Ratni at village Jamotli.

The first information of the offences was lodged by the appellant himself at police station Palkot on 11th August, 1963 at 3-15 P.M. The information was reduced to writing by the officer-in-charge, Sub-Inspector H. P. Choudhury, and the appellant affixed his left thumb-impression on the report. The Sub-Inspector immediately took cognisance of the offence, and arrested the appellant. The next day, the Sub-Inspector in the company of the appellant went to the house of Ratni, where the appellant pointed out the dead bodies of Ratni and Dilu and also a place in the orchard of Ratni covered with bushes and grass, where he had concealed a *tangi*. The appellant then took the Sub-Inspector and witnesses to Kasiari Garha Khet and pointed out the dead body of Chamin lying in a ditch covered with *ghunghu*. The appellant then took the Sub-Inspector and the witnesses to Dungijharan Hills, where he pointed out the dead body of Somra lying in the slope of the hills, to the north. The Sub-Inspector also recovered from the appellant's house a *chadar* stained with human blood. The evidence of P.W. 6 shows that the appellant had gone to the forest on the morning of 11th August, 1963.

The medical evidence discloses incised wounds on all the dead bodies. The injuries were caused by a sharp-cutting weapon such as a *tangi*. All the four persons were brutally murdered.

There is no eye-witness to the murders. The principal evidence against the appellant consists of the first information report, which contains a full confession of guilt by the appellant. If this report is excluded, the other evidence on the record is insufficient to convict the appellant. The principal question in the appeal is whether the statement or any portion of it is admissible in evidence.

The first information report reads as follows:

"My name is Aghnu Nagesia (1) My father's name is Lodhi Nagesia. I am a resident of Lotwa, Tola Jamtoli, Thana Palkot, District Ranchi To-day, Sunday, date not known, at about 3 P.M. I having come to the P S. make statement before you the S I. of Police (2) that on account of my Barima (aunt) Mussammat having given away her property to her daughter and son-in-law quarrels and troubles have been occurring among us. My Barima has no son and she is a widow. Hence on her death we shall be owners of her lands and properties and daughter and son-in-law of Barimashall have no right to them. She lives separate from us, and lives in her house with her daughter and son-in-law and I live with my brother separately in my house. Our lands are separate from the time of our father (3) To-day in the morning at about 7—8 A.M. I had gone with a *tangi* to Duni Jharan Pahar to cut shrubs for fencing. I found Somra sitting alone there who was grazing cattle there, (4) Seeing him I got enraged and dealt him a *tangi* blow on the filli (calf) of right leg, whereby he toppled down on the ground Thereupon I dealt him several Chheo (blows) on the head and the face, with the result that he became speechless and died At that time there was none near about on that Pahar. (5) Thereafter I came to the Kesari Garu field where Somra's wife Chamin was weeding out grass in the field (6) I struck her also all of a sudden on the head with the said *tangi* whereby she dropped down on the ground and died then and there (7) Thereafter I dragged her to an adjoining field and laid her in a ditch to the north of it and covered her body with Gongu (Pala ke Chhata) so that people might not see her. There was no person then at that place also (8) Thereafter I armed with that *tangi* went to the house of my Barima to kill her When I reached there, I found that she was sitting near the hearth which was burning (9) Reaching there all of a sudden I began to strike her on the head with *tangi* whereupon she dropped down dead at that very place. (10) Near her was Somra's son aged about 3-4 years (11) I also struck him with the *tangi*. He also fell down and died (12) I finished the line of my Barima so that no one could take share in her properties (13) I hid the *tangi* in the *ghari* of my Barima's house (14) Later on I narrated the occurrence to my *chacha* (father's brother) Lerha that I killed the aforesaid four persons with *tangi* After sometime (15) I started for the P S. to lodge information and reaching the P S. I make this statement before you (16) My Barima had all along been quarrelling like a *Murukh* (foolish woman) and being vexed, I did so (17) All the dead bodies and the *tangi* would be lying in those places I can point them out. (18) This is my statement. I got it read over to me and finding it correct, I affixed my left thumb-impression."

We have divided the statement into 18 parts. Parts 1, 15 and 18 show that the appellant went to the police station to make the report. Parts 2 and 16 show his motive for the murders. Parts 3, 5, 8 and 10 disclose the movements and opportunities of the appellant before the murders. Part 8 also discloses his intention. Parts 4, 6, 9 and 11 disclose that the appellant killed the four persons. Part 12

discloses the killing and the motive. Parts 7, 13 and 17 disclose concealment of a dead body and a *tangi* and his ability to point out places where the dead bodies and the *tangi* were lying. Part 14 discloses the previous confession by the appellant. Broadly speaking, the High Court admitted in evidence parts 1, 2, 3, 5, 7, 8, 10, 13, 15, 16, 17 and 18.

On behalf of the appellant, it is contended that the entire statement is a confession made to a police officer and is not provable against the appellant, having regard to section 25 of the Indian Evidence Act, 1872. On behalf of the respondent, it is contended that section 25 protects only those portions of the statement which disclose the killings by the appellant and the rest of the statement is not protected by section 25.

Section 25 of the Evidence Act is one of the provisions of law dealing with confessions made by an accused. The law relating to confessions is to be found generally in sections 24 to 30 of the Evidence Act and sections 162 and 164 of the Code of Criminal Procedure, 1898. Sections 17 to 31 of the Evidence Act are to be found under the heading "Admissions". Confession is a species of admission, and is dealt with in sections 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 25 provides: "No confession made to a police officer, shall be proved as against a person accused of an offence". The terms of section 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by section 26 relates to a confession made to a person other than a police officer. Section 26 does not qualify the absolute ban imposed by section 25 on a confession made to a police officer. Section 27 is in the form of a proviso, and partially lifts the ban imposed by sections 24, 25 and 26. It provides that when any fact is proved to be discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 162 of the Code of Criminal Procedure forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence under investigation, save as mentioned in the proviso and in cases falling under sub-section (2), and it specifically provides that nothing in it shall be deemed to affect the provisions of section 27 of the Evidence Act. The words of section 162 are wide enough to include a confession made to a police officer in the course of an investigation. A statement or confession made in the course of an investigation may be recorded by a Magistrate under section 164 of the Code of Criminal Procedure subject to the safeguards imposed by the section. Thus, except as provided by section 27 the Evidence Act, a confession by an accused to a police officer is absolutely protected under section 25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by section 162 of the Code of Criminal Procedure, and a confession to any other person made by him while in the custody of a police officer is protected by section 26, unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy, and the fullest effect should be given to them.

Section 154 of the Code of Criminal Procedure, provides for the recording of the first information. The information report as such is not substantive evidence.

It may be used to corroborate the informant under section 157 of the Evidence Act or to contradict him under section 145 of the Act, if the informant is called as a witness. If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under section 8 of the Evidence Act. If the information is a non-confessional statement, it is admissible against the accused as an admission under section 21 of the Evidence Act and, is relevant, see *Faddi v. The State of Madhya Pradesh*¹, explaining *Naisar Ali v. State of U.P.*² and *Dal Singh v. King Emperor*³. But a confessional first information report to a police officer cannot be used against the accused in view of section 25 of the Evidence Act.

The Indian Evidence Act does not define "confession". For a long time, the Courts in India adopted the definition of "confession" given in Article 22 of Stephen's Digest of the Law of Evidence. According to that definition, a confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed that crime. This definition was discarded by the Judicial Committee in *Pakala Narayanaswami v. The King Emperor*⁴. Lord Atkin observed :

"... no statement that contains self-exculpatory matter can amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession."

These observations received the approval of this Court in *Palvinder Kaur v. The State of Punjab*⁵. In *State of U.P. v. Deoman Upadhyaya*⁶, Shah, J., referred to a confession as a statement made by a person stating or suggesting the inference that he has committed a crime.

Shortly put, a confession may be defined as an admission of the offence by a person charged with the offence. A statement which contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. If an admission of an accused is to be used against him, the whole of it should be tendered in evidence, and if part of the admission is exculpatory and part inculpatory, the prosecution is not at liberty to use in evidence the inculpatory part only. See *Hanumant v. State of U.P.*⁷ and *Palvinder Kaur v. The State of Punjab*⁵. The accused is entitled to insist that the entire admission including the exculpatory part must be tendered in evidence. But this principle is of no assistance to the accused where no part of his statement is self-exculpatory, and the prosecution intends to use the whole of the statement against the accused.

Now, a confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact, i.e., some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact contained in the statement is part of the confession.

1. (1965) 1 S.C.J. 203 : (1965) M.L.J. (Cr1) 93 : A.I.R. 1964 S.C. 1850

2. (1957) S.C.J. 392 : (1957) M.L.J. (Cr1) 314 : (1957) S.C.R. 657 : A.I.R. 1957 S.C. 366

3. 33 M.L.J. 555 : L.R. 44 I.A. 137 : A.I.R. 1917 P.C. 25

4. (1939) 1 M.L.J. 756 : (1939) L.R. 66 I.A. 66 : 81 : A.I.R. 1939 P.C. 47.

5. (1952) S.C.J. 545 : (1953) S.C.R. 94, 104 : A.I.R. 1952 S.C. 354.

6. (1961) 2 S.C.J. 334 : (1961) 2 M.L.J. (S.C.) 90 : (1961) 2 A.W.R. (S.C.) 90 : (1961) M.L.J. (Cr1) 554 : (1961) 1 S.C.R. 14, 21 : A.I.R. 1960 S.C. 1125

7. (1952) S.C.J. 509 : (1952) 2 M.L.J. 631 : (1952) S.C.R. 1091, 1111 : A.I.R. 1952 S.C. 343.

If proof of the confession is excluded by any provision of law such as section 24, section 25 and section 26 of the Evidence Act, the entire confessional statement in all its parts including the admissions of minor incriminating facts must also be excluded, unless proof of it is permitted by some other section such as section 27 of the Evidence Act. Little substance and content would be left in sections 24, 25 and 26 if proof of admissions of incriminating facts in a confessional statement is permitted.

Sometimes, a single sentence in a statement may not amount to a confession at all. Take a case of a person charged under section 304-A of the Indian Penal Code and a statement made by him to a police officer that :

"I was drunk ; I was driving a car at a speed of 80 miles per hour ; I could see A on the road at a distance of 80 yards ; I did not blow the horn ; I made no attempt to stop the car ; the car knocked down A."

No single sentence in this statement amounts to a confession, but the statement read as a whole amounts to a confession of an offence under section 304-A of the Indian Penal Code, and it would not be permissible to admit in evidence each sentence separately as a non-confessional statement. Again, take a case where a single sentence in a statement amounts to an admission of an offence. A states "I struck B with a *tangi* and hurt him." In consequence of the injury B died. A committed an offence and is chargeable under various sections of the Indian Penal Code. Unless he brings his case within one of the recognised exceptions, his statement amounts to an admission of an offence, but the other parts of the statement such as the motive, the preparation, the absence of provocation, concealment of the weapon and the subsequent conduct, all throw light upon the gravity of the offence and the intention and knowledge of the accused, and negatives the right of private defence, accident and other possible defences. Each and every admission of an incriminating fact contained in the confessional statement is part of the confession.

If the confession is caused by an inducement, threat or promise as contemplated by section 24 of the Evidence Act, the whole of the confession is excluded by section 24. Proof of not only the admission of the offence but also the admission of every other incriminating fact such as the motive, the preparation and the subsequent conduct is excluded by section 24. To hold that the proof of the admission of other incriminating facts is not barred by section 24 is to rob the section of its practical utility and content. It may be suggested that the bar of section 24 does not apply to the other admissions, but though receivable in evidence, they are of no weight, as they were caused by inducement, threat or promise. According to this suggestion, the other admissions are relevant, but are of no value. But we think that on a plain construction of section 24, proof of all the admissions of incriminating facts contained in a confessional statement is excluded by the section. Similarly, sections 25 and 26 bar not only proof of admissions of an offence by an accused to a police officer or made by him while in the custody of a police officer but also admissions contained in the confessional statement of all incriminating facts related to the offence.

A little reflection will show that the expression "confession" in sections 24 to 30 refers to the confessional statement as a whole including not only the admissions of the offence but also all other admissions of incriminating facts related to the offence. Section 27 partially lifts the ban imposed by sections 24, 25 and 26 in respect of so much of the information whether it amounts to a confession or not, as relates distinctly to the fact discovered in consequence of the information, if the other conditions of the section are satisfied. Section 27 distinctly contemplates that an information leading to a discovery may be a part of the confession of the accused and thus fall within the purview of sections 24, 25 and 26. Section 27 thus shows that a confessional statement admitting the offence may contain additional information as part of the confession. Again, section 30 permits the Court to take into consideration against a co-accused a confession of another accused affecting not only himself

but the other co-accused. Section 30 thus shows that matters affecting other persons may form part of the confession.

If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by section 25. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of section 25 is lifted by section 27.

Our attention is not drawn to any decision of this Court or of the Privy Council on the question whether apart from section 27, a confessional first information report given by an accused is receivable in evidence against him. Decisions of the High Courts on this point are hopelessly conflicting. They contain all shades of opinion ranging from total exclusion of the confession to total inclusion of all admissions of incriminating facts except the actual commission of the crime. In *Harji v. Emperor*¹ and *Noor Muhammad v. Emperor*², the Lahore High Court held that the entire confessional first information report was inadmissible in evidence. In *Emperor v. Harman Kisha*³, the Bombay High Court held that the entire confessional report dealing with events on the night of the offence was hit by section 25, and it could not be said that portions of it dealing with the motive and the opportunity were not parts of the confession. In *King Emperor v. Kommoju Brahman*⁴, the Patna High Court held that no part of the confessional first information report was receivable in evidence, the entire report formed a single connected story and no part of it had any meaning or significance except in relation to the whole, and it would be wrong to extract parts of the statement and treat them as relevant. This case was followed in *Adi Moola Padayachi v. State*⁵, and the Court admitted only the portion of the confessional first information report which showed it was given by the accused and investigation had started thereon. In *State of Rajasthan v. Shiv Singh*⁶, the Court admitted in evidence the last part of the report dealing with the movements of the accused after the commission of the offence, but excluded the other parts of the statement including those relating to motive and opportunity. In *Legal Remembrancer v. Lalit Mohan Singh Roy*⁷, the Calcutta High Court admitted in evidence the narrative of the events prior to the night of the occurrence disclosing the motive of the offence. This case was followed by the Nagpur Court in *Bharosa Ramdayal v. Emperor*⁸. In *Kartar Singh v. State*⁹, the Court admitted in evidence the introductory part and the portion narrating the motive and the opportunity. In *Ram Singh v. The State*¹⁰, the Rajasthan High Court held that where it is possible to separate parts of the first information report by an accused from that in which he had made a confession, that part which can be so separated should be admitted in evidence, and on this view, admitted a part of the report relating to motive and subsequent conduct including the statement that the accused had left the deceased lying wounded and breathing in the *tibari* and there was no hope of her surviving and he had come having covered her with a cloth. In *Lachhuman Munda v. The State of Bihar*¹¹, the Patna High Court admitted in evidence portions of the first information report relating to the motive, the opportunity and the entire narrative of events before and after the crime. This case was followed in the judgment under appeal. Some of the decided cases took the view that if a part of the report is properly severable from the strict confessional part, then the severable part could be tendered in evidence. We think that the separability test is misleading, and the entire confessional statement is hit by section 25 and save and except as provided by section 27 and save and except the formal part identifying the accused as the maker of the report, no part of it could be tendered in evidence.

1. A.I.R. 1918 Lah. 69.

2. (1925) 90 I.C. 148.

3. (1935) I.L.R. 59 Bom. 120.

4. (1940) I L.R. Pat. 301, 308, 314.

5. 1950 M W N 528.

6. A.I.R. 1952 Raj. 3.

7. (1922) I.L.R. 49 Cal. 167.

8. A.I.R. 1941 Nag. 86.

9. A.I.R. 1952 Pepsu 98.

10. (1952) I.L.R. 2 Raj. 93.

11. A.I.R. 1964 Pat. 210.

We think, therefore, that save and except parts 1, 15 and 18 identifying the appellant as the maker of the first information report and save and except the portions coming within the purview of section 27, the entire first information report must be excluded from evidence.

Section 27 applies only to information received from a person accused of an offence in the custody of a police officer. Now, the Sub-Inspector stated he arrested the appellant after he gave the first information report leading to the discovery. *Prima facie*, therefore, the appellant was not in the custody of a police officer when he gave the report, unless it can be said that he was then in constructive custody. On the question whether a person directly giving to police officer information which may be used as evidence against him may be deemed to have submitted himself to the custody of the police officer within the meaning of section 27, there is conflict of opinion. See the observations of Shah, J., and Subba Rao, J., in *State of U.P. v. Deoman Upadhyaya*¹. For the purposes of the case, we shall assume that the appellant was constructively in police custody and therefore the information contained in the first information report leading to the discovery of the dead bodies and the *tangi* is admissible in evidence. The entire evidence against the appellant then consists of the fact that the appellant gave information as to the place where the dead bodies were lying and as to the place where he concealed the *tangi*, the discovery of the dead bodies and the *tangi* in consequence of the information, the discovery of a blood-stained chadar from the appellant's house and the fact that he had gone to Dungi Jharan Hills on the morning of 11th August, 1963. This evidence is not sufficient to convict the appellant of the offences under section 302 of the Indian Penal Code.

In the result, the appeal is allowed, the convictions and sentence passed by the Courts below are set aside, and the appellant is directed to be set at liberty forthwith.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J. G. SHAH AND S. M. SIKRI, JJ.

V. N. Sarin

.. Appellant*

v.

Major Ajit Kumar Poplai and another

.. Respondents.

¹ *Delhi Rent Control Act (LIX of 1958), section 14 (c)—Applicability—"An acquisition by transfer"—If includes partition of the coparcenary property among the coparceners in a Hindu family.*

Where property originally belonging to an undivided Hindu family is allotted to the share of one of the coparceners as a result of partition, it cannot be said that the said property has been acquired by such person by transfer; and so section 14 (6) of the Delhi Rent Control Act cannot be invoked by the tenant sought to be evicted by the coparcener to whom the property had been allotted on partition, on the ground that he *bona fide* required the house for his occupation. What section 14 (6) provides is that the purchaser should acquire the premises by transfer and that necessarily assumes that the title to the property which the purchaser acquires by transfer did not vest in him prior to such transfer. Having regard to the object intended to be achieved by this provision it cannot be held that a person who acquired property by partition can fall within the scope of its provision even though the property he acquired by partition did in a sense belong to him before such transfer.

Appeal by Special Leave from the Judgment and Order dated 1st March, 1965 of the Punjab High Court at Delhi in Second Appeal from Order No. 235/D of 1963.

Purushottam Trikamdas, Senior Advocate (*D. Guburdhaun*, Advocate, with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (*B. N. Kirpal*, Advocate, with him), for Respondents.

¹ (1961) 2 S.C.J. 334 : (1961) 2 M.L.J. : M.L.J. (Cl) 554 : (1961) 1 S.C.R. 14, 21 : A.I.R. (S.C.) 90 : (1961) 2 An.W.R. (S.C.) 90 : (1961) 1960 S.G. 1125.

* C.A. No. 468 of 1965. 9th August, 1965.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—The short question of law which arises in this appeal is whether the partition of the coparcenary property among the coparceners can be said to be “an acquisition by transfer” within the meaning of section 14 (6) of the Delhi Rent Control Act, 1958 (LIX of 1958) (hereinafter called ‘the Act’). This question arises in this way. The premises in question are a part of a bungalow situate at Racquet Court Road, Civil Lines, Delhi. The bungalow originally belonged to the joint Hindu family consisting of respondent No. 2, Mr. B. S. Poplai and his two sons, respondent No. 1 Major Ajit Kumar Poplai and Vinod Kumar Poplai. The three members of this undivided Hindu family partitioned their coparcenary property on 17th May, 1962, and as a result of the said partition, the present premises fell to the share of respondent No. 1. The appellant V. N. Sarin has been inducted into the premises as a tenant by respondent No. 2 before partition at a monthly rental of Rs. 80. After respondent No. 1 got this property by partition, he applied to the Rent Controller for the eviction of the appellant on the ground that her equired the premises *bona fide* for his own residence and that of his wife and children who are dependent on him. To this application, he impleaded the appellant and respondent No. 2.

The appellant contested the claim of respondent No. 1 on three grounds. He urged that respondent No. 1 was not his landlord inasmuch as he was not aware of the partition and did not know what it contained. He also urged that even if respondent No. 1 was his landlord, he did not require the premises *bona fide*; and so, the requirements of section 14 (1) (e) of the Act were not satisfied. The last contention raised by him was that if respondent No. 1 got the property in suit by partition, in law it meant that he had acquired the premises by transfer within the meaning of section 14 (6) of the Act and the provisions of the said section make the present suit incompetent.

The Rent Controller held that respondent No. 1 was the exclusive owner of the premises in suit by virtue of partition. As such, it was found that he was the landlord of the appellant. In regard to the plea made by respondent No. 1 that he needed the premises *bona fide* as prescribed by section 14 (1) (e), the Rent Controller rejected the case of respondent No. 1. The point raised by the appellant under section 14 (6) of the Act was not upheld on the ground that acquisition of the suit premises by partition cannot be said to be acquisition by transfer within the meaning of the said section. As a result of the finding recorded against respondent No. 1 under section 14 (1) (e) however, his application for the appellant’s eviction failed.

Against this decision, respondent No. 1 preferred an appeal to the Rent Control Tribunal, Delhi. The said Tribunal agreed with the Rent Controller in holding that respondent No. 1 was the landlord of the premises in suit and had not acquired the said premises by transfer. In regard to the finding recorded by the Rent Controller under section 14 (1) (e), the Rent Control Tribunal came to a different conclusion. It held that respondent No. 1 had established his case that he needed the premises *bona fide* for his personal use as prescribed by the said provision. In the result, the appeal preferred by respondent No. 1 was allowed and the eviction of the appellant was ordered.

This decision was challenged by the appellant by preferring a Second Appeal before the Punjab High Court. The High Court upheld the findings recorded by the Rent Control Tribunal on the question of the status of respondent No. 1 as the landlord of the premises and on the plea made by him that his claim for eviction of the appellant was justified under section 14 (1) (e). In fact, these two findings could not be and were not challenged before the High Court which was dealing with the matter in Second Appeal. The main contention which was raised before the High Court was in regard to the construction of section 14 (6); and on this point, the High Court has agreed with the view taken by the Rent Control Tribunal and has held that respondent No. 1 cannot be said to have acquired the premises in suit by transfer within the meaning of the said section. It is against this decree

that the appellant has come to this Court by Special Leave. Mr. Purshottam for the appellant argues that the view taken by the High Court about the construction of section 14 (6) is erroneous in law. That is how the only point which arises for our decision is whether the partition of the coparcenary property among the coparceners could be said to be an acquisition by transfer under section 14 (6) of the Act.

The Act was passed in 1958 to provide, *inter alia*, for the control of rents and evictions in certain areas in the Union Territory of Delhi. This Act conforms to the usual pattern adopted by rent control legislation in this country. Section 2 (e) defines a "landlord" as meaning a person who, for the time being, is receiving, or is entitled to receive, the rent of any premises, whether on his own account or on account of or on behalf of, or for the benefit of, any other person or as a trustee, guardian or receiver for any other person or who would so receive the rent or be entitled to receive the rent, if the premises were let to a tenant. It has been found by all the Courts below that respondent No. 1 is a landlord of the premises and this position has not been and cannot be disputed in the appeal before us.

Section 14 (1) of the Act provides for the protection of tenants against eviction. It lays down that notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any Court or Controller in favour of the landlord against a tenant. Having thus provided for general protection of tenants in respect of eviction, clauses (a) to (l) of the proviso to the said section lay down that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the grounds covered by the said clauses; clause (e) of section 14 (1) is one of such clauses and it refers to cases where the premises let for residential purposes are required *bona fide* by the landlord for occupation as therein described. The Rent Control Tribunal and the High Court have recorded a finding against the appellant and in favour of respondent No. 1 on this point and this finding also has not been and cannot be challenged before us.

That takes us to section 14 (6). It provides that where a landlord has acquired any premises by transfer, no application for the recovery of possession of such premises shall lie under sub-section (1) on the ground specified in clause (e) of the proviso thereto, unless a period of five years has elapsed from the date of the acquisition. It is obvious that if this clause applies to the claim made by respondent No. 1 for evicting the appellant, his application would be barred, because a period of five years had not elapsed from the date of the acquisition when the present application was made. The High Court has, however, held that where property originally belonging to an undivided Hindu family is allotted to the share of one of the coparceners as a result of partition, it cannot be said that the said property has been acquired by such person by transfer; and so, section 14 (6) cannot be invoked by the appellant. The question which we have to decide in the present appeal is whether this view of the High Court is right.

Before construing section 14 (6), it may be permissible to enquire what may be the policy underlying the section and the object intended to be achieved by it. It seems plain that the object which this provision is intended to achieve is to prevent transfers by landlords as a device to enable the purchasers to evict the tenants from the premises let out to them. If a landlord was unable to make out a case for evicting his tenant under section 14 (1) (e), it was not unlikely that he may think of transferring the premises to a purchaser who would be able to make out such a case on his own behalf; and the Legislature thought that if such a course was allowed to be adopted, it would defeat the purpose of section 14 (1). In other words, where the right to evict a tenant could not be claimed by a landlord under section 14 (1) (e), the Legislature thought that the landlord should not be permitted to create such a right by adopting the device of transferring the premises to a purchaser who may be able to prove his own individual case under section 14 (1) (e). It is possible that this provision may, in some cases, work hardship, because if a transfer is made by a landlord who could have proved his case under section 14 (1) (e), the transferee would be precluded from making a claim for the eviction of the tenant within five

years even though he, in his turn, would also have proved his case under section 14 (1) (e). Apparently, the Legislature thought that the possible mischief which may be caused to the tenants by transfers made by landlords to circumvent the provisions of section 14 (1) (e) required that an unqualified and absolute provision should be made as prescribed by section 14 (6). That, in our opinion, appears to be the object intended to be achieved by this provision and the policy underlying it.

Mr. Purshottam, however, contends that when an item of property belonging to the undivided Hindu family is allotted to the share of one of the coparceners on partition, such allotment in substance amounts to the transfer of the said property to the said person and it is, therefore, an acquisition of the said property by transfer. *Prima facie*, it is not easy to accept this contention. Community of interest and unity of possession are the essential attributes of coparcenary property; and so, the true effect of partition is that each coparcener gets a specific property in lieu of his undivided right in respect of the totality of the property of the family. In other words, what happens at a partition is that in lieu of the property allotted to individual coparceners they, in substance, renounce their right in respect of the other properties; they get exclusive title to the properties allotted to them and as a consequence, they renounce their undefined right in respect of the rest of the property. The process of partition, therefore, involves the transfer of joint enjoyment of the properties by all the coparceners into an enjoyment in severality by them of the respective properties allotted to their shares. Having regard to this basic character of joint Hindu family property, it cannot be denied that each coparcener has an antecedent title to the said property, though its extent is not determined until partition takes place. That being so, partition really means that whereas initially all the coparceners have subsisting title to the totality of the property of the family jointly, that joint title is by partition transformed into separate titles of the individual coparceners in respect of several items of properties allotted to them respectively. If that be the true nature of partition, it would not be easy to uphold the broad contention raised by Mr. Purshottam that partition of an undivided Hindu family property must necessarily mean transfer of the property to the individual coparceners. As was observed by the Privy Council in *Girja Bai v. Sadashiv Dhundiraj and others*¹:

"Partition does not give him (a coparcener) a title or create a title in him; it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers."

Mr. Purshottam, however, strongly relies on the fact that there is preponderance of judicial authority in favour of the view that a partition is a transfer for the purpose of section 53 of the Transfer of Property Act. It will be recalled that the decision of the question as to whether a partition under Hindu Law is a transfer within the meaning of section 53, naturally depends upon the definition of the word "transfer" prescribed by section 5 of the said Act. Section 5 provides that in the following sections, "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons. It must be conceded that in a number of cases, the High Courts in India have held that partition amounts to a transfer within the meaning of section 53, *vide*, for instance, *Soniram Raghushet and others v. Dwarkabai Shridharshet and another*², and the cases cited therein. On the other hand, there are some decisions which have taken a contrary view, *vide Naramsetti Venkatappala Narasimhalu and another v. Naramsetti Someswara Rao and another*³ and *Gutta Radhakrishnayya v. Gutta Sarasamma*⁴.

In this connection, Mr. Purshottam has also relied on the fact that under section 17 (1) (b) of the Indian Registration Act, a deed of partition is held to be a

1. (1916) 31 M.L.J. 455 : L.R. 43 I.A. 151 505.
at p. 161.

2. A.I.R. 1951 Bom. 94.

3. (1948) 1 M.L.J. 150 : A.I.R. 1948 Mad.

4. (1950) 2 M.L.J. 338 : I.L.R. (1951) Mad. 607 : A.I.R. 1951 Mad. 213.

non-testamentary instrument which purports to create a right, title or interest in respect of the property covered by it, and his argument is that if for the purpose of section 17 (1) (b) of the Registration Act as well as for the purpose of section 53 of the Transfer of Property Act, partition is held to be a transfer of property, there is no reason why partition should not be held to be an acquisition of property by transfer within the meaning of section 14 (6) of the Act.

In dealing with the present appeal, we propose to confine our decision to the narrow question which arises before us and that relates to the construction of section 14 (6). What section 14 (6) provides is that the purchaser should acquire the premises by transfer and that necessarily assumes that the title to the property which the purchaser acquires by transfer did not vest in him prior to such transfer. Having regard to the object intended to be achieved by this provision, we are not inclined to hold that a person who acquired property by partition can fall within the scope of its provision even though the property, which he acquired by partition did in a sense belong to him before such transfer. Where a property belongs to an undivided Hindu family and on partition it falls to the share of one of the coparceners of the family, there is no doubt a change of the landlord of the said premises, but the said change is not of the same character as the change which is effected by transfer of premises to which section 14 (6) refers. In regard to cases falling under section 14 (6), a person who had no title to the premises and in that sense, was a stranger, becomes a landlord by virtue of the transfer. In regard to a partition, the position is entirely different. When the appellant was inducted into the premises, the premises belonged to the undivided Hindu family consisting of respondent No. 1, his father and his brother. After partition, instead of the undivided Hindu family, respondent No. 1 alone had become landlord of the premises. We are satisfied that it would be unreasonable to hold that allotment of one parcel of property belonging to an undivided Hindu family to an individual coparcener as a result of partition is an acquisition of the said property by transfer by the said coparcener within the meaning of section 14 (6). In our opinion, the High Court was right in coming to the conclusion that section 14 (6) did not create a bar against the institution of the application by respondent No. 1 for evicting the appellant.

In this connection, we may refer to a recent decision in this Court in the *Commissioner of Income-tax, Gujarat v. Keshavlal Lallubhai Patel*¹. In that case, the respondent Keshavlal had thrown all his self-acquired property into the common hotch-pot of the Hindu undivided family which consisted of himself, his wife, a major son and a minor son. Thereafter, an oral partition took place between the members of the said family and properties were transferred in accordance with it in the names of the several members. The question which arose for the decision of this Court was whether there was an indirect transfer of the properties allotted to the wife and minor son in the partition within the meaning of section 16 (3) (a) (iii) and (iv) of the Indian Income-tax Act, 1922. This Court held that the oral partition in question was not a transfer in the strict sense and should not, therefore be said to attract the provisions of section 16 (3) (a) (iii) and (iv) of the said Act. This decision shows that having regard to the context of the provision of the Income-tax Act with which the Court was dealing, it was thought that a partition is not a transfer. Considerations which weighed with the Court in determining the true effect of partition in the light of the provisions of the said section, apply with equal force to the interpretation of section 14 (6) of the Act.

In the result, the appeal fails and is dismissed with costs. Before we part with this appeal, we would like to add that on the appellant undertaking to vacate the suit premises within three months from the date of this decision, Mr. Sastri for respondent No. 1 has fairly agreed not to execute the decree during the said period.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.
 Madhya Pradesh Industries, Ltd. .. Appellant*

v.

Union of India and others .. Respondents.

*Mines and Minerals (Regulation and Development) Act (LXVII of 1957), section 17—Applicability
 Constitution of India (1950), Article 136—Administrative tribunals subject to Special Appeal jurisdiction—
 Duty to give reasons for the orders.*

Mineral Concession Rules (1960), rule 55—Orders under—Duty to give reasons.

Section 17 of Mines and Minerals (Regulation and Development) Act has nothing to do with public or private sector; it applies only to a specific case where the Central Government proposes to undertake prospecting or mining operations in any area not already held under any prospecting licence or mining lease. In that event it shall follow the particular procedure before undertaking mining operations. Where it is only intended to lease out mining rights the section has no application. Where in revision the Central Government has affirmed the order of the State Government rejecting the application of the appellant for grant of mining leases and subsequently the State Government had again called for applications for mining leases and the appellant had a fresh opportunity to apply for the leases, the case is not a fit one for interference with the order of the Central Government in revision in an appeal by Special Leave under Article 136 of the Constitution. The appellant was not entitled to a personal hearing before the Central Government affirmed the order of the State Government.

Where the Central Government rejected the revision application holding that the application did not disclose any valid ground for interference, it was sufficient. The Central Government acting under rule 55 of the Mineral Concession Rules, 1960 was not bound to give in its order fuller reasons for rejecting the application.

An order of Court dismissing a revision application often gives no reasons, but this is not a sufficient ground for quashing it. Likewise an order of an administrative tribunal rejecting a revision application cannot be pronounced to be invalid on the sole ground that it does not give reasons for the rejection. For the purposes of appeal under Article 136, orders of Courts and tribunals stand on the same footing.

Per Subba Rao, J.—What is essential is that reasons shall be given by an appellate or revisional tribunal, expressly by reference to those given by the original tribunal. The nature and elaboration of the reasons necessarily depend upon the facts of each case. In the present case neither the State Government's nor the Central Government's order discloses the reasons for rejecting the application of the appellant. In the circumstances the Central Government's order is vitiated, as it does not disclose any reasons for rejecting the revision application of the appellant.

Appeal by Special Leave from the order dated the 17th October, 1964 of the Government of India, Ministry of Steel and Mines, Department of Mines and Metals on an application under rule 54 of the Mineral Concession Rules, 1960.

G. S. Pathak, Senior Advocate (S. N. Andley and Rameshwar Nath, Advocates of M/s. Rajinder Narain & Co., with him), for Appellant.

S. V. Gupta, Solicitor-General of India (R. N. Sachlhey and B.-R. G. K. Achar, Advocates, with him), for Respondent.

The Court delivered the following Judgments :—

Subba Rao, J.—This appeal by Special leave is directed against the order of the Government of India rejecting the revision filed by the appellant against the order of the Government of Maharashtra.

The appellant, the Madhya Pradesh Industries, Ltd., is a public limited company engaged in mining manganese ore. On 5th February, 1941, one Rai Bahadur Bansilal Abirchand took a lease of a land of extent 216 acres and 92 cents in the Government Forest, East Pench Range, in the Tahsil of Ramtek in the District

of Nagpur, from the Governor of Central Provinces and Berar for a term of 15 years commencing from 10th September, 1940. Under an indenture dated 4th March, 1952, the appellant obtained a transfer of the said leasehold interest from the successors in interest of the said Bansilal Abirchand. After the transfer, the appellant entered into possession of the said extent of land and is alleged to have spent about Rs. 10,00,000 for the purpose of developing the area to carry out the mining operation. The said lease was to expire on 9th September, 1955. On the expiry of the said lease the appellant applied for the renewal of the lease for a further period of 20 years to the appropriate authority, namely, the Secretary to Government, Commerce and Industries Department, Madhya Pradesh, Nagpur. After a protracted correspondence covering a period of about 3 years, the officer on special duty, Industries and Co-operation Department, State of Bombay, informed the appellant by letter dated 2nd September, 1958, that the said renewal could not be granted. The appellant filed a revision against that order to the Central Government, but that was dismissed on 14th December, 1958. On 9th April, 1959, the State of Bombay issued a notification calling for applications from the public in respect of the lease of the said mines. On 15th May, 1959, the appellant filed an application for the grant of a lease for a period of 20 years in respect of the said mines. Presumably others also filed similar applications. On 8th July, 1959, the Government of Bombay made an order granting the entire area of the said mines to the appellant and by letter dated 14th July, 1959, informed him of the same. During the year 1960 the territories forming part of the State of Bombay were divided and the State of Maharashtra and the State of Gujarat came into being and the said mines fell in the Maharashtra State. On 25th August, 1960, the Maharashtra Government issued a notification for the information of the public that the said mines were reserved for the exploitation of minerals in the public sector. Thereafter on 16th January, 1961, the Collector of Nagpur informed the appellant that its application for the lease of the mines was rejected as the mines in question fell in a block reserved for State exploitation. On 11th March, 1961, the appellant filed a revision to the Central Government against the said order. On 22nd June, 1961, the Central Government informed the appellant that instructions had been issued to the Government of Maharashtra, Industries and Labour Department, Bombay, for reconsidering its application and, therefore, it might pursue the matter with the said Government. Accordingly, the appellant took up the matter with the Maharashtra Government. By letter dated 19th December, 1961, the Government of Maharashtra informed the appellant that its application for the mining lease had been rejected. Thereafter, the appellant on or about 17th February, 1962, filed a revision application before the Central Government against the said order of the Government of Maharashtra. On 17th October, 1964, the Central Government rejected the revision application. It is stated in the counter-affidavit filed by the Central Government that subsequently the Government of Maharashtra, after obtaining the consent of the Central Government, had issued a notification dated 26th March, 1965, inviting applications from the public for the grant of mineral concessions in the said area. It is also stated therein that the appellant has submitted its application for the grant of mining lease in respect of the said area in response to the said notification. This is not disputed. The appellant filed the present appeal against the order of the Central Government dated 17th October, 1964, dismissing its revision petition against the order of the Government of Maharashtra. To that appeal, the Central Government is made the first respondent; the Under Secretary to the Government of India in the Ministry of Steel and Mines, who made the said order, the second respondent; and the State of Maharashtra, the third respondent.

Mr. Pathak, learned Counsel for the appellant raised before us the following points: (1) The order passed by the Central Government is bad, because, though it is a judicial order, no reasons are given for rejecting the revision of the appellant. (2) The order is bad also because it has not complied with the principles of natural justice, namely, (i) though the appellant requested for a personal hearing, it was not acceded to; and (ii) the Central Government had taken into consideration extraneous

matters without giving an opportunity to the appellant to explain them. (3). The order of the Central Government is illegal, because, it ignored the final order made by the State Government granting the lease of the mines to the appellant and also because it should have held that the Central Government could not place the mines in the public sector without complying with the provisions of section 17 of the Mines and Minerals (Regulation and Development) Act, 1957 (LXVII of 1957); hereinafter called the Act.

The learned Solicitor-General while controverting the legality of the said contentions, points out that this is not a fit case for the exercise of the discretionary jurisdiction of this Court under Article 136 of the Constitution inasmuch as the Maharashtra Government has now called for fresh applications for the granting of licence in respect of the said mines and the appellant, along with others, has put in its application to the said Government.

To appreciate the first point it will be convenient at the outset to read the relevant provisions of the Act and the Rules made thereunder. Under section 5 of the Act, no mining lease shall be granted by a State Government to any person unless he satisfied the conditions laid down therein. Under section 8 (2) thereof, no mining lease can be granted in respect of manganese ore, among others, without the previous approval of the Central Government. Section 10 prescribes that an application for a mining lease in respect of any land in which the minerals vest in the Government shall be made to the State Government concerned in the prescribed manner. Section 30 confers on the Central Government power to revise any order of the State Government either on an application made by an aggrieved party or *suo motu*. In supersession of the earlier Rules, the Central Government, in exercise of the powers conferred on it by section 13 of the Act, made Rules for carrying out the purpose of the Act. Chapter IV of the Rules provides for the grant of mining leases in respect of land in which the minerals belong to Government and also the manner of disposal of applications for a mining lease or for the renewal of mining lease by the State Government. Rule 26 says that where the State Government passes any order refusing to grant or renew a mining lease, it shall communicate in writing the reasons for such order to the person against whom such order is passed. Under rule 54, any person aggrieved by any order made by the State Government may within two months from the date of the communication of the order to him apply to the Central Government for the revision of the order. A Court-fee is prescribed for the said revision. Rule 55, which is the crucial rule, reads :

“Where a petition for revision is made to the Central Government under rule 54, it may call for the record of the case from the State Government, and after considering any comments made on the petition by the State Government or other authority, as the case may be, may confirm, modify or set aside the order or pass such other order in relation thereto as the Central Government may deem just and proper

Provided that no order shall be passed against an applicant unless he has been given an opportunity to make his representations against the comments, if any, received from the State Government or other authority ”

A perusal of the said provisions makes it abundantly clear that the State Government exercising its powers under the Act and the Rules made thereunder deals with matters involving great stakes ; presumably for the said reason, the Central Government is constituted as an authority to revise the order of the State Government. Rules 54 and 55 lay down the procedure for filing a revision against the order of the State Government and the manner of its disposal. Under rule 54, a revision application has to be filed with the prescribed Court-fee; and under rule 55; the Central Government, after calling for the records from the State Government and after considering any comments made on the petition by the State Government or other authority, as the case may be, may make an appropriate order therein. The proviso expressly says that no order shall be made unless the petitioner has been given an opportunity to make his representations against the said comments. The entire scheme of the Rules posits a judicial procedure and the Central Government is constituted as a tribunal to dispose of the said revision. Indeed, this Court in *Shivji Nathubhai v. The Union of India*¹ ruled that the Central Government,

1. (1960) S.C.J. 579 : (1960) 2 S.C.R. 775 : A.I.R. 1960 S.C. 606.

exercising its power of review under rule 54 of the Mineral Concession Rules, 1949, was acting judicially as a tribunal. The new rule, if at all, is clearer in that regard and emphasizes the judicial character of the proceeding. If it was a tribunal, this Court under Article 136 of the Constitution can entertain an appeal against the order of the Central Government made in exercise of its revisional powers under rule 55 of the Rules. This Court in a later decision in *M/s. Harinagar Sugar Mills, Ltd. v. Shyam Sundar Jhunjhumwala*¹ went further and held that, as the decision of the Central Government was subject to an appeal to the Supreme Court under Article 136 of the Constitution, the State Government should give reasons for its order. It is true that in that case the Central Government reversed the order of the Directors of a company refusing to register transfers, but that was not the basis of the decision. The necessity for giving reasons was founded on the existence of an appeal to the Supreme Court against the said order.

The learned Solicitor-General argues that, if the Central Government is to give reasons when it functions as a tribunal, it will obstruct the work of the Government and lead to unnecessary delays. I do not see any justification for this contention. The Central Government functions only through different officers and in this case it functioned through an Under Secretary. The condition of giving reasons is only attached to an order made by the Government when it functions judicially as a tribunal in a comparatively small number of matters and not in regard to other administrative orders it passes. The delay in disposal of cases can be attributed to many reasons and certainly not to the giving of reasons by tribunals.

The question cannot be disposed of on purely technical considerations. Our Constitution posits a Welfare State; it is not defined, but its incidents are found in Chapters III and IV thereof, i.e., the Parts embodying fundamental rights and directive principles of State Policy respectively. "Welfare State" as conceived by our Constitution is a State where there is prosperity, equality, freedoms and social justice. In the context of a Welfare State, administrative tribunals have come to stay. Indeed, they are the necessary concomitants of a Welfare State. But arbitrariness in their functioning destroys the concept of a Welfare State itself. Self-discipline and supervision exclude or at any rate minimize arbitrariness. The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory Court to keep the tribunals within bounds. A reasoned order is a desirable condition of judicial disposal.

The conception of exercise of revisional jurisdiction and the manner of disposal provided in rule 55 of the Rules are indicative of the scope and nature of the Government's jurisdiction. If tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuse of power. But, if reasons for an order are given, it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard.

It is said that this principle is not uniformly followed by appellate Courts, for appeals and revisions are dismissed by appellate and revisional Courts *in limine* without giving any reasons. There is an essential distinction between a Court and an administrative tribunal. A Judge is trained to look at things objectively, uninfluenced by considerations of policy or expediency; but, an executive officer generally looks at things from the stand-point of policy and expediency. The habit of mind of an executive officer so formed cannot be expected to change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing orders affecting the rights of parties; and the least they should do is to give reasons for their orders. Even in the case

1. (1963) 1 S.C.J. 471 : (1962) 2 S.C.R. 339 : A.I.R. 1961 S.C. 1669.

of appellate Courts invariably reasons are given, except when they dismiss an appeal or revision *in limine* and that is because the appellate or revisional Court agrees with the reasoned judgment of the subordinate Court or there are no legally permissible grounds to interfere with it. But the same reasoning cannot apply to an appellate tribunal, for as often as not the order of the first tribunal is laconic and does not give any reasons. That apart, when we insist upon reasons, we do not prescribe any particular form or scale of the reasons. The extent and the nature of the reasons depend upon each case. Ordinarily, the appellate or revisional tribunal shall give its own reasons succinctly ; but in a case of affirmance where the original tribunal gives adequate reasons, the appellate tribunal may dismiss the appeal or the revision, as the case may be, agreeing with those reasons. What is essential is that reasons shall be given by an appellate or revisional tribunal expressly or by reference to those given by the original tribunal. The nature and the elaboration of the reasons necessarily depend upon the facts of each case. In the present case, neither the State Government's nor the Central Government's order discloses the reasons for rejecting the application of the appellant. In the circumstances the Central Government's order is vitiated, as it does not disclose any reasons for rejecting the revision application of the appellant.

As regards the second contention, I do not think that the appellant is entitled as of right to a personal hearing. It is no doubt a principle of natural justice that a quasi-judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him. Indeed, rule 55 of the Rules, quoted *supra*, recognizes the said principle and states that no order shall be passed against any applicant unless he has been given an opportunity to make his representations against the comments, if any, received from the State Government or other authority. The said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal. The facts of the present case disclose that a written representation would effectively meet the requirements of the principles of natural justice. But there is some apparent justification in the submission that the Central Government had taken into consideration an extraneous matter that came into existence subsequent to the filing of the revision, namely, that Messrs. Manganese Ore (India), Ltd., which is a public sector undertaking, had applied for the lease of the area in question on 5th October, 1962, for the purpose of mining. The appellant did not allege in its affidavit that this fact was not brought to its notice before the Central Government made the order ; indeed, it did not file any reply affidavit to the effect that the said matter was kept back from it. I would have pursued the matter a little further but for the fact that I am refusing to interfere in this appeal on other grounds.

There are no merits in the contention that the Government of Bombay by its order dated 14th July, 1959, granted the entire area of the said mines to the appellant ; for, under the Act the State Government has no power to make such a grant of Manganese Ore except with the previous approval of the Central Government. Admittedly, no such approval was obtained. The said order can, therefore, only be construed at best to be a recommendation to the Central Government.

Nor can I agree with the contention of the learned Counsel based upon section 17 of the Act. The contention is that if the State Government intended to entrust the exploitation of the said mines to the public sector it could have done so only in strict compliance with the provisions of section 17 of the Act. Section 17 of the Act has nothing to do with public or private sector ; it applies only to a specific case where the Central Government proposes to undertake prospecting or mining operations in any area not already held under any prospecting licence or mining lease. In that event it shall follow a particular procedure before undertaking the mining operations. In the present case there was no proposal on the part of the Central Government to undertake the mining operation in the area in question. That section has, therefore, no bearing on the question raised.

I have already noticed that after the disposal of the revision by the Central Government the State Government again changed its mind and called for applications from the public for grant of mining licence in respect of the said area and the appellant, along with others, has applied for the same. Learned Counsel for the appellant, though he admits the said fact, contends that though the appellant has a fresh opportunity to apply for the lease of the mines, it has to meet competition from others who did not enter the field earlier. But the people who entered the field earlier did not prefer any revision against the order of the State Government and, presumably, if we interfere at this stage, there would be unnecessary complications and public interest might suffer, as it might turn out that the appellant would be the only surviving applicant in the field among the earlier applicants. Though the appellant has to compete with others who were not earlier in the field—on this question we have no precise information—it has certainly an opportunity to apply for the lease. In the circumstances I do not think that this is a fit case for our interference in the exercise of our discretionary jurisdiction.

The appeal is dismissed, but in the circumstances of the case, without costs.

Bachawat, J. (on behalf of *Mudholkar, J.*, and himself).—We agree that the appeal should be dismissed. We agree that (a) this is not a fit case for interference under Article 136 of the Constitution; (b) the appellant was not entitled to a personal hearing; (c) section 17 of the Mines and Minerals (Regulation and Development) Act (LXVII of 1957) has no bearing on the question in issue, and (d) the order of the Government of Bombay dated 14th July, 1959, was, in effect, a recommendation to the Central Government for the grant of a mining licence to the appellant.

But we are unable to agree with the contention of Mr. Pathak that the order of the Central Government dated 17th October, 1964, rejecting the revision application under rule 55 of the Mineral Concession Rules, 1960, is bad, because it did not give any reasons. By its order dated 19th December, 1961, the State Government of Maharashtra rejected the appellant's application for a mining lease for the reasons mentioned in the order. On 17th February, 1962, the appellant filed a revision application before the Central Government against the order of the State Government under rule 55 of the Mineral Concession Rules, 1960. By its order dated 17th October, 1964, the Central Government rejected the revision application stating :—

"I am directed to refer to your application No. A/32/8163, dated 17th February, 1962 on the above subject, and to say that after careful consideration of the grounds stated therein, the Central Government have come to the conclusion that there is no valid ground for interfering with the decision of the Government of Maharashtra rejecting your application for grant of mining lease for manganese over an area of 216.92 acres in Government Forest, East Panch Range, W.C. Junewani, Tahsil Ramtek, District Nagpur. Your application for revision is, therefore, rejected."

The reason for rejecting the revision application appears on the face of the impugned order. The revision application was rejected, because the Central Government agreed with the reasons given by the State Government in its order dated 19th December, 1961, and the application did not disclose any valid ground for interference with the order of the State Government. In our opinion, the Central Government, acting under rule 55, was not bound to give in its order, fuller reasons for rejecting the application.

Mr. Pathak contended that the effect of Article 136 of the Constitution is that every order appealable under that Article must be a speaking order and the omission to give reasons for the decision is of itself a sufficient ground for quashing it. We are unable to accept this broad contention. For the purposes of an appeal under Article 136, orders of Courts and tribunals stand on the same footing. An order of Court dismissing a revision application often gives no reasons, but this is not a sufficient ground for quashing it. Likewise, an order of an administrative tribunal rejecting a revision application cannot be pronounced to be invalid on the sole ground that it does not give reasons for the rejection.

In support of his contention Mr. Pathak relied upon the following observations of Shah, J., in *Harinagar Sugar Mills, Ltd. v. Shyam Sundar Jhunjhunwala*¹:

"If the Central Government acts as a tribunal exercising judicial powers and the exercise of that power is subject to the jurisdiction of this Court under Article 136 of the Constitution, we fail to see how the power of this Court can be effectively exercised if reasons are not given by the Central Government in support of its order."

In that case, it appears that the Central Government acting as an appellate tribunal under section 111 (3) of the Companies Act, 1956, had without giving any reasons for its order, set aside a resolution of the directors of a company refusing to register certain transfers of shares. There was nothing on the record to show that the Central Government was satisfied that the action of the directors in refusing to register the shares was arbitrary and untenable, and, moreover, on the materials on the record it was not possible to decide whether or not the Central Government transgressed the limits of its restricted power under section 111 (3). The Central Government reversed the decision appealed from without giving any reasons; nor did the record disclose any apparent ground for the reversal. In this context, Shah, J., made the observations quoted above, and held that there was no proper trial of the appeals and the appellate order should be quashed. Hidayatullah, J., at page 370 of the Report pointed out that there was no reason for the reversal and the omission to give reasons led to the only inference that there was none to give. There is a vital difference between the order of reversal by the appellate authority in that case for no reason whatsoever and the order of affirmance by the revising authority in the present case. Having stated that there was no valid ground for interference, the revising authority was not bound to give fuller reasons. It is impossible to say that the impugned order was arbitrary, or that there was no proper trial of the revision application.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—A. K. SARKAR, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.

Kanwal Ram and others

Appellants*

The Himachal Pradesh Administration

Respondent.

Penal Code (XLV of 1860), sections 494 and 109—Charge of bigamy—Proof of impugned marriage—Essentials.

Where the evidence of the witness called to prove the impugned marriage in a prosecution for bigamy, showed that the essential ceremonies had not been performed, that evidence cannot justify a conviction.

In a bigamy case the second marriage as a fact, that is to say the ceremonies constituting it must be proved; Admission of marriage by accused is not evidence of it for the purpose of proving marriage in adultery and bigamy case.

Appeal by Special Leave from the Judgment and Order, dated the 13th July, 1963 of the Judicial Commissioner's Court, Himachal Pradesh, in Criminal Appeal No. 7 of 1963.

S. C. Agarwala, R. K. Garg and D. P. Singh, Advocates of Messrs. Ramamurthi & Co., for Appellants.

K. L. Hathi and B. R. G. K. Achar, Advocates, for Respondent.

The Judgment of the Court was delivered by

Sarkar, J.—This appeal arises out of a conviction for bigamy and for the abetment of it under sections 494 and 109 of the Indian Penal Code. The trial Court acquitted the accused persons but on appeal the Judicial Commissioner of Himachal Pradesh convicted them. Hence this appeal.

¹ (1963) 1 S.C.J. 471; (1962, 2 S.C.R. 339, 357: A.I.R., 1961 S.C., 1669.

* Cr. A. No. 167 of 1963

19th August, 1965.

Originally four persons were charged, namely, Kubja, the bride, Kanwal Ram, the bridegroom, Hira Nand and Seesia both relations of the bride, the latter two having been charged under section 494 read with section 109 for abetment of the offence of bigamy committed by the two first-mentioned accused. The charges were framed on the complaint of Sadh Ram to whom Kubja had been earlier married. The complainant had also implicated Hiroo, the mother of Kubja but she was discharged by the Magistrate. Hira Nand died pending the appeal in this Court.

Sadh Ram was married to Kubja some time in 1940-41. The marriage between the appellant Kanwal Ram and Kubja is said to have taken place in September, 1955. By this time the Hindu Marriage Act, 1955, had come into force and it prohibited the marriage of a Hindu during the lifetime of his or her spouse. The parties belong to a village in Himachal Pradesh among whom a customary form of marriage called Praima, is recognised. Both the marriages were performed according to that form. The marriage of Kubja with Sadh Ram though originally challenged is now accepted. The only question is whether the second marriage of Kubja that is to say, between Kubja and Kanwal Ram, has been proved.

The evidence would show that for a marriage in this form the following ceremonies are essential. First some agnatic relation of the bridegroom goes to the bride's house and offers her "suhag". Thereafter, a relation of the bride who is called prainu, brings her to the house of the bridegroom. There at the door of the house of the bridegroom coins are put in a pot and then Puja and Katha (reading of holy scriptures) are held. The bride then picks up the pot and takes that to the family hearth and bows there. Then she makes obeisance to the father-in-law and the mother-in-law and other elders in the family. Lastly, with feasting the ceremonies end. The complainant Sadh Ram himself admitted that puja at the entrance and bowing at the hearth by the bride after she had picked up the pot were compulsory ceremonies. He added, "If any one of these ceremonies is not performed, then the marriage is not complete."

Now all that the only witness who spoke about the ceremonies observed at the marriage of Kubja and Kanwal Ram said was that Seesia had brought the suhag and Hira Nand acted as Prainu. He does not mention any of the other ceremonies to which we have earlier referred.

It was contended for the appellants that this evidence was not enough to show that the marriage of Kubja and Kanwal Ram can be said to have been performed. We think this contention is justified. In *Bhawrao Shankar Lokhande v. The State of Maharashtra*¹, this Court held that a marriage is not proved unless the essential ceremonies required for its solemnisation are proved to have been performed. The evidence of the witness called to prove the marriage ceremonies, showed that the essential ceremonies had not been performed. So that evidence cannot justify the conviction. The trial Court also took the same view. The learned Judicial Commissioner does not seem to have taken a different view.

The learned Judicial Commissioner, however, thought that apart from the evidence about the marriage ceremonies earlier mentioned there was other evidence which would prove the second marriage. He first referred to a statement by the appellant Kanwal Ram that he had sexual relationship with Kubja. We are entirely unable to agree that this, even if true, would at all prove his marriage with Kubja. Then the learned Judicial Commissioner relied on a statement filed by Kubja, Hira Nand and Hiroo in answer to an application for restitution of conjugal rights filed by Sadh Ram against Kubja and others, in which it was stated that Kubja married Kanwal Ram after her marriage with Sadh Ram had been dissolved. Now the statement admitting the second marriage by these persons is certainly not evidence of the marriage so far as Kanwal Ram and Seesia are concerned; they did not make it. Nor do we think it is evidence of the marriage even as against Kubja. First,

treated as an admission, the entire document has to be read as a whole and that would prove the dissolution of the first marriage of Kurbja which would make the second marriage innocent. Secondly, it is clear that in law such admission is not evidence of the fact of the second marriage having taken place. In a bigamy case, the second marriage as a fact, that is to say, the ceremonies constituting it, must be proved : *Empress v. Pitambur Singh*¹, *Empress v. Kallu*², Archbold Criminal Pleading Evidence and Practice (35th Edition), Article 3796. In *Kallu's case*², and in *Morris v. Miller*³, it has been held that admission of marriage by the accused is not evidence of it for the purpose of proving marriage in an adultery or bigamy case (see also Archbold Criminal Pleading Evidence and Practice (35th Edition), Article 3781). We are unable, therefore, to think that the written statement of Kurbja affords any assistance towards proving her marriage with Kanwal Ram.

Learned Counsel for the respondent State drew our attention to *R. v. Robinson*⁴, in support of his contention that it is not necessary to prove that all the ceremonies required for the particular form of marriage had been observed. We do not think the case supports that proposition. There the second marriage had been performed according to a Scottish custom observing all the necessary formalities. It appeared however that in order to be able to contract a marriage in that form one of the parties to it had to reside in Scotland for twenty-one days which none of the parties to the second marriage in that case had done. It was, therefore, held that the marriage was not valid and the decision was that this invalidity of the marriage did not affect the liability for bigamy. It was said that the validity of the second marriage did not signify. The judgment pointed out that the previous marriage always rendered the second marriage invalid. Reference was made there to *R. v. Allen*⁵, for the proposition that the contracting of a second marriage in an offence of bigamy meant only going through the form and ceremony of marriage with another person. It was there found that the form adopted by the parties was clearly recognised by law as capable of producing a valid marriage. This form having been observed, the Court upheld the conviction for bigamy though the marriage turned out to be invalid by reason of the absence of the necessary condition precedent as to residence for twenty-one days in Scotland. This case does not show that if the formalities required to create a valid marriage had not been observed, a conviction would have resulted. Indeed in *Lokhande's case*⁶, this Court has held to the contrary.

We, therefore, think that the appeal must be allowed and order accordingly. The conviction of the appellants is set aside and their bail bonds cancelled.

K.S. Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.
Ratilal Balabhai Nazar. Appellant.

v.
Ranchhodhai Shankarbhai Patel and another. Respondents.

Civil Procedure Code (V of 1908), section 115.—Order of lower Court based on wrong construction of a section—If open to revision.

Bombay Rents, Hotel and Lodging House Rates Control Act, (LVII of 1947), section 12.—Order for possession passed on wrong construction of the section.—If open to interference in revision.

An erroneous construction placed upon the relevant provision (in the instant case the provisions of section 12 of Bombay Rents, Hotel and Lodging House Rates Control Act (1947)) would not furnish a ground for interference under section 115 of the Civil Procedure Code.

Appeal by Special Leave from the Judgment and Order dated the 9th July, 1962 of the Gujarat High Court in Civil Revision Application No. 501 of 1962.

1. (1880) I.L.R. 5 Cal 566

2. (1882) I.L.R. 5 All. 233.

3. 4 Burr. 2057; 98 E.R. 73.

* C.A. No. 1012 of 1963.

4. (1938) 1 A.E.R. 301.

5. (1872) L.R. 1 C.C.R. 367.

6. S.C. Cr. A. No. 178 of 1963 unreported.

23rd August, 1965.

A. M. Peerzada and S. N. Prasad, Advocates, and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of Messrs. J. B. Dadachanji & Co., for Appellant.

B. Sen, Senior Advocate (M. N. Shroff and I. N. Shroff, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Mudholkar, J.—This is an appeal by Special Leave against the order of the High Court of Gujarat dismissing summarily the appellant's application under section 115, Code of Civil Procedure for revision of the judgment of the Principal Judge of the City Civil Court, Ahmedabad, passed in an appeal under section 29 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.

The appellant is the tenant of certain premises belonging to the respondent, the rent of which was fixed at Rs. 50. According to the respondent, the appellant was required under the terms of the tenancy to pay in addition municipal taxes and charges for electric energy consumed by him. The appellant did not pay rent from 1st June, 1956, for a period of over six months, in consequence of which the respondent gave a notice to him on 20th February, 1957, terminating his tenancy and also demanding the rent and other charges which were due from the appellant. As the appellant did neither vacate the premises, nor pay the arrears due from him, the respondent instituted a suit on 1st April, 1957 for recovery of possession and for the recovery of Rs. 838-11-0. This amount comprised of the standard rent in arrears amounting to Rs. 600, proportionate electric charges of Rs. 59-13-0 ; Rs. 158-14-0 in respect of municipal taxes and Rs. 25 as charges incurred for giving notice to him. In his written statement the appellant pleaded that the rent of Rs. 50 p.m. was inclusive of taxes as well as of charges for consumption of electricity. Subsequently, however, as the appellant sought leave to amend his written statement by adding to it the plea that the rent agreed to originally between the parties was excessive and that the reasonable rent would be Rs. 30 p.m. The amendment was allowed by the trial Court, and upon the finding that the standard rent of Rs. 50 was inclusive of municipal taxes and electric charges and the relief for possession was refused to the respondent. The Court found that on 30th June, 1960, the total amount due to the respondent in respect of rent was Rs. 2,550. It may be mentioned that at the first hearing of the suit the appellant had in fact deposited Rs. 2,890 in Court, which, according to him, was an amount larger than that due to the respondent on the date of deposit. While passing the decree the trial Court directed that out of the amount deposited by the appellant a sum of Rs. 2,550 and half the costs of the suit be paid to the respondent and the remaining amount returned to the appellant. In appeal the Principal Judge of the City Civil Court held that the appellant was bound to pay taxes and electric charges and also held that there was a *bona fide* dispute between the parties about standard rent. But upon a construction placed by him on the provisions of section 12 of the Act the learned Judge held that the case fell under section 12 (1) of the Act read with the *Explanation* thereto and not under either clause (a) or clause (b) of sub-section (3) of section 12. Upon that view he decreed the relief for possession in favour of the respondent and also held the respondent entitled to a sum of Rs. 90-9-0 in addition to the amount of Rs. 2,550 decreed by the trial Court.

Mr. Peerzada, who appears for the appellant, relying upon the decision of this Court in *Jashwantraji Malukchand v. Anandilal Bapalal*¹, contended that the view taken by the Principal Judge is not in accord with what this Court has taken in the aforesaid case. *Prima facie* the decision of this Court supports the contention of the appellant ; but even so, we are constrained to hold that the High Court was not, in the exercise of its jurisdiction under section 115, Code of Civil Procedure, which was invoked by the appellant, competent to interfere and that the limitation placed

1. Since reported in A.I.P. 1967 S.C. 1419

upon the powers of the High Court under that section would also circumscribe the power of this Court to interfere under Article 136 of the Constitution. No doubt, by an erroneous construction of the relevant provisions the Principal Judge of the City Civil Court granted relief of possession to the respondent to which he would not have been entitled had the provision been rightly construed. Even so, as observed by this Court in *Abbasbhai v. Gulamnabi*¹ an erroneous construction placed upon the relevant provision would not furnish a ground for interference under section 115 of the Code. It may be mentioned that in that case also the question was about the construction of section 12 (3) (b) of this very Act, and an argument similar to the one advanced before us was addressed in it. Rejecting that argument this Court observed:

"The District Court on an erroneous view of section 12 (3) (b) held that the requirements of that provision were complied with by the defendant, but it also held that having regard to the circumstances the readiness and willingness contemplated by sub-section (1) was otherwise established. The High Court had, in exercise of its powers under section 115, Civil Procedure Code, no authority to set aside the order merely because it was of the opinion that the judgment of the District Court was assailable on the ground of error of fact or even of law. Jurisdiction to try the suit was conferred upon the Subordinate Judge by section 28 (1) (b) of the Act, and the decree or order passed by the Subordinate Judge was by section 29 (1) (b) subject to appeal to the District Court of the District in which he functioned; but all further appeals were by sub-section (2) of section 29 prohibited. The power of the High Court under section 115, Civil Procedure Code, was not thereby excluded, but the exercise of that power is by the terms of the statute investing it severally restricted."

After referring to the decision of the Privy Council in *Balakrishna Udayar v. Vasudeva Aiyar*² and quoting a portion therefrom this Court observed:

"Therefore, if the trial Court had jurisdiction to decide a question before it and did decide it, whether it decided it rightly or wrongly, the Court had jurisdiction to decide the case and even if it decided the question wrongly, it did not exercise its jurisdiction illegally or with material irregularity."

On behalf of the plaintiff in that case Mr. Chatterjee relying upon the decision in *Joy Chand Lal Babu v. Kamalaksha Chowdhury*³ had contended that the District Court in declining to pass a decree in ejectment refused to exercise a jurisdiction vested in it by law and, therefore, the case fell within the terms of clause (b) of section 115, Civil Procedure Code. This contention was negatived by the Court after citing the following passage from the opinion of Sir John Beaumont in that case. The passage runs thus:

"There have been a very large number of decisions of Indian High Courts on section 115 to many of which their Lordships have referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a Subordinate Court does not by itself involve that the Subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under sub-section (c), nevertheless, if the erroneous decision results in the Subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (a) or sub-section (b) and sub-section (c) can be ignored."

This Court then observed that the Privy Council had distinguished between cases in which on a wrong decision the Court assumes jurisdiction which is not vested in it or refuses to exercise jurisdiction which is vested in it by law and those in which in exercise of its jurisdiction the Court arrives at a conclusion erroneous in law or in fact, and that while in the former class of cases exercise of revisional jurisdiction by the High Court is permissible it is not permissible in the latter class of cases.

Reliance was also placed in the aforesaid case upon the decision of this Court in *Manindra Land and Building Corporation, Ltd. v. Bhutnath Banerjee and others*⁴ where it was held that the Court was in error in setting aside the decree of the District Court in exercise of its revisional powers under section 115. The decisions both in *Vora Abbasbhai's case*¹ and *Manindra Land and Building Corporation's case*⁴ were

1. A I R. 1964 S.C. 1341 at p. 1346

131.

2. (1917) 33 M.L.J. 69 : L.R. 44 I A 261 : I.L.R. 40 Mad. 793.

4. (1965) 1 S.C.J. 109 : (1964) 3 S.C.R. 495 :

A.I.R. 1964 S.C. 1336.

3. (1949) 2 M.L.J. 6 : L.R. (1949) 76 I A

referred to in *Maruti Hari Jaday and others v. Pandurang Dhondi Chougale and others*¹ by a Constitution Bench of this Court in which it was observed :

“The effect of these two decisions clearly is that a distinction must be drawn between the errors committed by Subordinate Courts in deciding questions of law which have relation to, or are concerned with, questions of jurisdiction of the said Court, and errors of law which have no such relation or connection.”

We are bound by these decisions and, therefore, it is not open to us to examine the merits of the contention advanced by Mr. Peerzada. We, therefore, dismiss this appeal; but in the particular circumstances direct the parties to bear their own costs in this Court.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—J. C. SHAH, J. (Vacation Judge).

Sadhu Singh

*Petitioner**

v.
The Delhi Administration

Respondent.

Defence of India Rules (1962) rule 30-A (8)—Review after six months for deciding whether detention should continue—If quasi-judicial and not executive in nature—If subject to judicial review—Failure to give opportunity to detenu to show cause against proposed action—Effect.

The subjective satisfaction of the detaining authority is condition of the making of the order of detention, and if that condition is shown to exist, the Courts have no power to enquire into the sufficiency of materials on which the order is made or the propriety or expediency of making the order. That however, does not exclude the Courts power to investigate into the compliance with the procedural safeguards imposed by the statute, or into the existence of prescribed conditions precedent to the exercise of power, or into a plea that the order was made *mala fide* or for a collateral purpose. That however, is not judicial review of the order which is pre-eminently an executive act. A review under rule 30-A (8) of the circumstances on which the order of detention was made in the light of the circumstances since the date of the order to decide whether the order should be continued or cancelled, cannot but be regarded as an executive order. Satisfaction of the authority under rule 30 (1) proceeding upon facts and circumstances which justifies him in making an order of detention and the satisfaction upon the review of those very facts and circumstances, in the light of circumstances, which came into existence since the order of detention, are the result of an executive determination and not subject to judicial review. Merely because no opportunity was given to the detenu to make his representations against the action proposed to be taken, a writ of *certiorari* does not lie to remove or adjudicate upon the order which is of an administrative or ministerial nature.

There is no principle or binding authority in support of the view that wherever a public authority is invested with power to make an order which prejudicially affects the rights of an individual, whatever may be the nature of the power exercised, whatever may be the procedure prescribed, and whatever may be the nature of the authority conferred, the proceeding of the public authority must be regulated by the analogy of rules governing judicial determination of disputed questions.

The use of the word “decide” in rule 30-A (8) does not compel a judicial approach. In exercise of the power of review of the detention order a condition of a judicial approach is not implied.

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights.

R. K. Garg and S. C. Agarwala, Advocates of *M/s. Ramamurthi & Co.*, for Petitioner.

R. H. Dhebar, Advocate, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—In exercise of the powers conferred by rule 30 (1) of the Defence of India Rules, 1962, the District Magistrate, Delhi, ordered that the petitioner be detained in the Central Jail, New Delhi. On 11th September, 1964, the District Magistrate informed the petitioner that the Administrator, Union Territory of

¹ 1. C.A. No. 163 of 1963, decided on 25th April, 1965.

* W.P. No. 43 of 1965.

1st June, 1965.

Delhi—hereinafter called 'the Administrator'—had reviewed the detention order dated 5th September, 1964, and had confirmed the same. On 12th April, 1965 the petitioner moved this Court for an "order setting aside his detention" and for an order for his release. He submitted, *inter alia*, that the District Magistrate had made the order for a collateral purpose; that there was nothing on the record to show that the District Magistrate reported forthwith the detention of the petitioner to the Administrator; or that the Administrator had reviewed the detention of the petitioner as required by law; and that in default of a "proper review" of the detention order by the Administrator under rule 30-A (8) of the Defence of India Rules, 1962, detention of the petitioner after six months from the date of the original order was unauthorised.

The District Magistrate, Delhi, swore an affidavit that he had carefully considered the materials placed before him and on being satisfied that the petitioner "was indulging in anti-social activities," and that the activities of the petitioner were prejudicial to the maintenance of public order, and that it was necessary to detain the petitioner, he made an order that the petitioner be detained; that the fact of detention was forthwith reported to the Administrator; that the Administrator had confirmed the order of detention on 5th September, 1964, and that the Administrator had also within six months from the date of detention reviewed that order and had decided on 24th February, 1965 to continue the detention of the petitioner.

By order dated 28th April, 1965, this petition was directed to be heard during the vacation and accordingly it was placed before me for hearing on 18th May, 1965. On that day, the petitioner filed an argumentative affidavit in rejoinder without setting out any facts, controverting the statements made by the District Magistrate.

In support of the petition, Counsel urged that the detention of the petitioner was without authority because the Administrator had confirmed the order under rule 30-A (6) (b) of the Defence of India Rules without taking into account all the circumstances which had a bearing upon the order of detention passed by the District Magistrate, and the Administrator reviewed the order of detention without affording an opportunity to the petitioner to satisfy him that the grounds which may have existed for directing the petitioner's detention did not exist on the date when the order was reviewed.

A resume of the relevant provisions of the Defence of India Act and the Rules may briefly be made. The Defence of India Act, 1962, was enacted by the Parliament with a view to arm the Central Government with extraordinary powers in the situation which arose on account of the Chinese invasion of the borders of India. By section 3 of the Act power was conferred upon the Central Government to make rules for securing the defence of India, civil defence, public safety, maintenance of public order and related matters. Rule 30 authorised the Central Government or the State Government, if it was satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, etc., it was necessary so to do, to make an order amongst others directing that he be detained. By rule 30-A machinery was set up for confirmation and review of detention orders. Clause (2) of rule 30-A provided that every detention order shall be reviewed in accordance with the provisions contained in the Rule. Clause (5) provided that a detention order made by an officer empowered by the Administrator shall forthwith be reported to the Administrator. By clause (6) it was provided that on receipt of a report under sub-rule (5) the Administrator shall after taking into account all the circumstances of the case, either confirm or cancel the order. Clause (8) provided that every detention order made by an officer empowered by the Administrator and confirmed by him under clause (b) of sub-rule (6) shall be reviewed at intervals of not more than six months by the Administrator who shall decide upon such review whether the order should be continued or cancelled.

The validity of the order of detention was challenged only on the ground that there had been no confirmation of the order by the Administrator in the manner provided by Rule 30-A (6) (b). In the petition it was alleged that there was in fact no confirmation by the Administrator. The District Magistrate in his affidavit stated that the Administrator had confirmed the order of detention on 5th September, 1964, and that all the procedural requirements relating to the making of the order were duly complied with. By his affidavit in rejoinder the petitioner merely argued that as the order was confirmed only on the basis of the report of the fact of detention, it could not be said that the order was confirmed after taking into account all the circumstances of the case under Rule 30-A (6). At the hearing Counsel for the petitioner asked for leave to amend the petition by setting up in support of the petition the ground that the Administrator had not taken into account all the circumstances of the case. In order to avoid any delay in the disposal of the petition, Counsel for the Delhi Administration, showed to me the order of confirmation made by the Administrator and the original order was handed up. The order *prima facie* suffered from no defect. Counsel for the petitioner did not urge any further argument in regard to the validity of the order of confirmation after the order was handed up by Counsel for the Delhi Administration.

Relying upon the use of the expression "the Administrator who shall decide upon such review whether the order should be continued or cancelled," it was urged that even if a proceeding directing detention of a person in exercise of powers under Rule 30 (1) and a proceeding for confirmation of the order may be purely administrative, a proceeding for review of the order under Rule 30-A (8) is quasi-judicial in character and the Administrator must afford to the detenu an opportunity to make his representation on the action proposed to be taken in regard to him on review. Counsel submitted that an order of review of detention leading to continuation of detention involves a judicial approach by the authorities to all the facts on the basis of which the original order of detention was made and a review of those facts in the light of subsequent developments including the change of views, if any, of the detenu since he was detained, and this, it was contended, cannot be effectively made unless the detenu is afforded an opportunity to make his representation and to convince the Administrator that the facts or circumstances which may have justified the making of the original order of detention did not continue to exist or in the context of changed circumstances did not justify the continuation of detention. Alternatively, it was contended that the use of the word "decide" in clause (8) of Rule 30-A implies the existence of a *lis* between the State on the one hand and the detenu on the other relating to the right of the State to continue to detain him after the expiry of the period of six months contemplated by the statute.

In my view there is no substance in either of the contentions. Rule 30 (1) has been enacted as an emergency measure; it authorises the appropriate Government or the Administrator, or authorities empowered by the Government or the Administrator, with a view to prevent a person from acting to the detriment of public order and safety, to detain him without trial. However shocking it may appear that a person may be detained without a trial or without being even informed of the specific grounds on which such action is deemed necessary, in the larger interests of the security of the State such as maintenance of peaceful conditions in the country, public order, conduct of military operations etc. the Parliament has thought it necessary when a grave emergency arose to invest the appropriate Government and the Administrator with that power. Validity of the statute which invests the Executive with these drastic powers has been upheld by this Court, and that is no longer a live issue. It is conceded, and in my judgment rightly, that the satisfaction of the authority which justified the use of the power under Rule 30, and confirmation of the order of detention are not subject to judicial review, for the order of detention without trial is pre-eminently an executive act. The subjective satisfaction of the detaining authority is a condition of the making of the order, and if that condition is shown to exist, the Courts have no power to enquire into the sufficiency of materials on which the order is made or the propriety or expediency

of making the order. It is the satisfaction of the prescribed authority which is determinative of the validity. That, however, does not exclude the Court's power to investigate into the compliance with the procedural safeguards imposed by the statute, or into the existence of prescribed conditions precedent to the exercise of power, or into a plea that the order was made *mala fide* or for a collateral purpose. That, however, is not judicial review of the order.

If jurisdiction of the Court to enter upon a judicial review of the order of detention and its confirmation is excluded, it is difficult to appreciate the grounds on which it may legitimately be urged that the decision to continue detention upon review of the order of detention may still be regarded as subject to judicial review. By clause (8) of Rule 30-A power is conferred upon the Administrator to review the detention at intervals of not more than six months. This provision has apparently been made for ensuring that detention of a person may not continue longer than is necessary for effectuating the purpose for which it was originally made. It invests the Administrator, subject to the restriction imposed, with power to review the order of detention from time to time and to decide whether the order should be continued or cancelled. Making of an order of detention proceeds upon the subjective satisfaction of the prescribed authority in the light of circumstances placed before him, or coming to his knowledge, that it is necessary to detain the person concerned with a view to preventing him from acting in any manner prejudicial to the Defence of India and civil defence, the public safety, the maintenance of public order etc. If that order is purely executive, and not open to review by the Courts, a review of those very circumstances on which the order was made in the light of the circumstances since the date of that order cannot but be regarded as an executive order. Satisfaction of the authority under Rule 30 (1) proceeding upon facts and circumstances which justifies him in making an order of detention and the satisfaction upon review of those very facts and circumstances in the light of circumstances, which came into existence since the order of detention, are the result of an executive determination and are not subject to judicial review.

It was, however, urged that even if this Court cannot review the determination of the authority, the Court is entitled to inquire whether the authority before making the order brought to bear upon it a judicial approach, that is whether the authority gave an opportunity to the detainee to make a representation against the action proposed to be taken in regard to him, and if it appears that he failed to do so, a writ of *certiorari* may issue and the order may be discharged by the issue of an appropriate writ.

There is no such safeguard prescribed by the statute: it is also not implicit in the scheme of the statute. A writ of *certiorari* lies wherever a body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority: it does not lie to remove or adjudicate upon the order which is of an administrative or ministerial nature. See *Province of Bombay v. Kusaldas S. Advani and others*¹.

Counsel for the petitioner contended that every order made by a public authority which affects the rights of an individual must of necessity be preceded by a quasi-judicial determination of the question on the determination of which the order may be made and if the determination is made contrary to the rules of natural justice, it is liable to be struck down by order of a competent Court. He submitted that this rule has been expounded by the House of Lords in a recent judgment (to be presently noticed). The view which this Court has taken is inconsistent with any such proposition e.g. observations of Kania, C.J., in *Advani's case*¹ at page 633, of Mukherjea, J., at page 669 and of S. R. Das, J., at page 715; and in my judgment the observations of Lord Reid in *Ridge v. Baldwin and others*² which Counsel for the petitioner leans upon, do not support that proposition. In *Ridge's case*² the watch

1. (1950) 2 M L J. 703 : (1950) S.C.J. 451 : (1950) S.C.R. 621. 2. L.R. (1964) A.C. 40.

committee of a Borough in purported exercise of powers conferred on them by section 191 (4) of the Municipal Corporations Act, 1882 dismissed a Chief Constable from his office, without formulating a specific charge, and without informing him of the grounds on which they proposed to proceed, and without giving him an opportunity to present his case. The watch committee in arriving at its decision considered, *inter alia*, his own statements in evidence and the observations made by the Judge who tried a case against him of conspiracy to obstruct the course of justice. The Chief Constable then brought an action against the watch committee for a declaration that his dismissal was "illegal, *ultra vires* and void." The House of Lords by a majority held that the Chief Constable could be dismissed by the watch committee only on grounds stated in section 191 (4) of the Act of 1882, and as they dismissed him on the ground of neglect of duty, they were bound to observe the principles of natural justice. The power of dismissal under section 191 (4) of Act of 1882 could not in the view of the House be exercised until the watch committee had informed the Chief Constable of the grounds on which they proposed to proceed and had given him a proper opportunity to present his case in defence, and the resolution of the watch committee without giving him that information, and affording him an opportunity to defend himself was null and void. *Ridge's case*¹ does not support the broad proposition that no order of public authority which affects the rights of a person may be made, without giving that person an opportunity of making a representation against the proposed order, and the observation made on pages 72 and 73 of the report are clearly against any such proposition. The House was dealing with a case involving the interpretation of a statute enacted at a time when, as the Parliament was well aware, the Courts habitually applied the principles of natural justice to provisions like section 191 (4) of the Act of 1882. The principal criticism of Lord Reid was directed against what he conceived was the misunderstanding of the well-known passage in the judgment of Atkin, L.J., in *Rex v. Electricity Commissioners, Ex parte London Electricity Joint Committee Company*², in subsequent decisions especially by Lord Hewart, C.J., in *Rex v. Legislative Committee of the Church Assembly, Ex parte Haynes Smith*³ and in the judgment of the Privy Council in *Nakkuda Ali v. Jayaratne*⁴—a case from Ceylon Atkin, L.J., in *Rex v. Electricity Commissioners, Ex parte London Electricity Joint Committee Company*² observed :

"But the operation of the writs (of prohibition and *certiorari*) has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, Courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

In dealing with a preliminary question whether a writ of prohibition may be issued to prohibit the Legislative Committee of the Church Assembly from proceeding with a measure called the "Prayer Book Measure, 1927," Lord Hewart, C.J., in *Rex v. Legislative Committee of the Church Assembly, Ex parte Haynes Smith*³ proceeded to observe at page 415 :

"In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially."

Lord Reid took exception to the last clause of the law so stated. He observed :

"If Lord Hewart means that it is never enough that a body simply has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially before it can be found to observe the principles of natural justice, then that appears to me impossible to reconcile with the earlier authorities."

The point of the criticism was that a body invested with authority to determine what the rights of an individual should be, may be held to perform a judicial function without something more in the statute to impose on it a duty to act judicially. But it was not said that whenever a body is called upon to determine or decide some question which affects the rights of an individual, the proceeding must be regarded as judicial.

1. L.R. (1964) A.C. 40

2. L.R. (1924) 1 K.B. 171, 205.

3. L.R. (1928) 1 K.B. 411.

4. L.R. (1951) A.C. 66.

In *Nakkuda Ali v. M. F. De S. Jayaratne*¹ a decision of the Judicial Committee in a case coming from Ceylon—an order of the Controller of Textiles in Ceylon cancelling the licence of a dealer under Rule 62 of the Defence (Control of Textiles) Regulations, 1945—a war-time regulation—which authorised him to cancel a licence “where the Controller had reasonable grounds to believe that any dealer was unfit to be allowed to continue as a dealer” was challenged in the Supreme Court of Ceylon by a petition for a writ of *certiorari*. The Supreme Court dismissed the petition, and the Judicial Committee affirmed the order. In the view of the Judicial Committee the words of Regulation 62 imposed “a condition that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation. But it does not follow necessarily from this that the Controller must be acting judicially in exercising this power.” The Judicial Committee observed :

“It is long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this regulation. If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of *certiorari*.”

and held that *certiorari* did not lie in the case. The Judicial Committee then quoted the passage already set out from the judgments of Atkin, L. J., in *Rex v. Electricity Commissioners, Ex parte London Electricity Joint Committee Company*², and of Lord Hewart, C.J. in *Rex v. Legislative Committee of the Church Assembly, Ex parte Haynes Smith*³ and observed that, “It is that characteristic that the Controller lacks in acting under regulation 62.”

In *Nakkuda Ali's case*¹ the Controller was *prima facie* dealing with a case in which the rights of a person were to be determined, but the Judicial Committee was of the view that the statute in the particular case did not require the Controller to act judicially. There is undoubtedly a clear distinction between cases in which an authority is invested with power to determine the rights of a person, and cases in which the authority is invested with power to act in a certain matter, and the exercise of that power affects the rights of a person. In the former, the duty to act judicially may readily be inferred. But whether a public authority invested with powers to pass a specified order is required to act judicially must depend upon the scheme of the statute which invests him with that power. The nature of the authority conferred, the procedure prescribed and the nature of the powers exercised will determine the question whether the public authority is required to act judicially; it is not however predicated that before a writ of *certiorari* or *prohibition* may issue the duty to act judicially must be expressly or independently imposed upon the authority called upon to determine the rights of a citizen. In the view of the Judicial Committee.

“If the mere requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially, there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy of judicial rules. The scheme of the Regulation therefore negated according to Judicial Committee, a judicial approach.”

I am not concerned in this case with the validity of the criticism by Lord Reid of the two decisions. It is sufficient to state for the purpose of this case that there is no principle or binding authority in support of the view that wherever a public authority is invested with power to make an order which prejudicially affects the rights of an individual, whatever may be the nature of the power exercised, whatever may be the procedure prescribed, and whatever may be the nature of the authority conferred, the proceeding of the public authority must be regulated by the analogy of rules governing judicial determination of disputed questions.

1. L.R. (1951) A.C. 66.

2. L.R. (1924) 1 K.B. 171, 205.

3. L.R. (1928) 1 K.B. 411.

The alternative contention that the use of the word "decide" in Rule 30-A (8) compels a judicial approach cannot also be sustained. As pointed out by Fazl Ali J., in *Advani's case*¹, at page 642 :

"The word 'decision' in common parlance is more or less a neutral expression and it can be used with reference to purely executive acts as well as judicial orders. The mere fact that an executive authority has to decide something does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference, and the real test is : Is there any duty to decide judicially ?"

Rule 30-A (8) requires the Administrator to review at intervals of not more than six months the detention order and then to decide upon such review whether the order be continued or cancelled. That only imports that the Administrator after reviewing the material circumstances has to decide whether the detention of the detenu should be continued or cancelled. Undoubtedly, in reviewing the order of detention, the Administrator would be taking into account all the relevant circumstances existing at the time when the order was made, the subsequent developments which have a bearing on the detention of the detenu and the representation, if any, made by the detenu. But the rule contemplates review of the detention order and in the exercise of a power to review a condition of a judicial approach is not implied.

Counsel for the petitioner said that the order of the Administrator dated 24th February, 1965, was invalid, because the Administrator had reviewed the order confirming the order of detention and not the order of detention. In the preamble clause there is a reference to a "report for review of the order, dated the 5th September, 1964 confirming the detention order" of the petitioner. But it is difficult to divorce the order of detention from the order of confirmation, for without confirmation the order of detention would have no legal sustenance. The Rule provides that the order of detention shall forthwith be reported, if made by an officer empowered by the Administrator, to the Administrator and that the Administrator shall, after taking into account all the circumstances of the case either confirm the detention order or cancel it. It is pursuant to the detention order so confirmed, that a person remains detained, and the review which is intended to be made under Rule 30-A (8) is of that order which is confirmed. The second paragraph of the order of the Administrator makes it clear that the detention order of the petitioner shall continue and that detention order is clearly the order made by the District Magistrate and confirmed by the Administrator.

The petition therefore fails and is dismissed.

K.S.

Petition dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, Chief Justice, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Sahib Singh Dugal and another

*Petitioners**

The Union of India

Respondent.

Defence of India Rules (1962) Rule 30 (1) (b)—Detention under of person (who had been in jail as under-trial prisoner for three months) immediately on his discharge—Validity.

The petitioner who was charged under the Official Secrets Act and was in jail as under-trial for three months was discharged as sufficient evidence could not be discovered against him. But the Union Government, immediately on his discharge served an order of detention on him under Rule 30 (1) (b) of the Defence of India Rules.

Held: The petitioner had been in jail only for three months before the order of detention was passed. It cannot be said that the conduct of the petitioner before this period of three months is not proximate enough to justify an order of detention based on that conduct.

1. (1950) S.C.J. 451 : (1950) 2 M.L.J. 763 : (1950) S.C.R. 621.

* W.Ps. Nos. 55 and 56 of 1965.

30th July, 1965

Rameshwar Shaw v. District Magistrate, Burdwan, A I.R. 1964 S G. 334 distinguished. From the mere fact that the authorities decided to drop the case under the Official Secrets Act and thereafter to order the detention of the petitioner under the Defence of India Rules, it cannot be inferred that the order of detention was *mala fide*.

It may not be possible to obtain a conviction for a particular offence; but the authorities may still be justified in ordering detention of a person in view of his past activities which will be of a wider range than the mere proof of a particular offence in a Court of law.

Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

R. Gopalakrishnan, Advocate, for Petitioners. (In both the Petitions).

R. Ganapathy Iyer, and *R. N. Sachthy*, Advocates, for Respondent (in both the Petitions).

The Judgment of the Court was delivered by

Wanchoo, J.—These two writ petitions under Article 32 of the Constitution for a writ of *habeas corpus* raise common questions and will be dealt with together. We may set out the facts in one of the petitions (namely Petition 55) in order to highlight the points raised on behalf of the petitioners. It is unnecessary to refer to the facts in the other petition as they are similar except that in the other case the original arrest took place on 6th December instead of 8th December.

Sahib Singh Dugal, petitioner was employed in the Posts and Telegraphs Directorate of the Central Government. He was arrested on 8th December, 1964, and put in jail as an under-trial prisoner for an offence under section 3 of the Official Secrets Act. Various remands were taken upto 11th March, 1965 in connection with the criminal case against the petitioner. It appears that besides Dugal, eight other persons were also involved in the case under section 3 of the Official Secrets Act, including Jagdev Kumar Gupta, petitioner in Petition No. 56 of 1965. On 11th March, 1965, the Deputy Superintendent of Police who was apparently in charge of the investigation made a report to the Court to the effect that all the nine persons involved in that criminal case might be discharged as sufficient evidence for their conviction could not be discovered during the investigation. Consequently, the Magistrate discharged all the nine persons including Sahib Singh Dugal and Jagdev Kumar Gupta petitioners and they were released from jail that very evening. Immediately after Sahib Singh Dugal came out of the jail, he was served with an order under rule 30 (1) (b) of the Defence of India Rules (hereafter referred to as the Rules). This order was passed by the Government of India and provided that Dugal be detained in order to prevent him from acting in a manner prejudicial to the Defence of India, public safety and India's relations with foreign powers. Dugal was then arrested and detained in the Central Jail, Tehar, New Delhi in accordance with the further order of the Government of India under Rule 30 (4) of the Rules.

The case of the petitioners before us is two-fold. In the first place they rely on the decision of this Court in *Rameshwar Shaw v. District Magistrate, Burdwan*¹, and their case is that in view of that decision the order of their detention and the service of that order are illegal and they are the refore entitled to release. In the second place, it is urged that the order of detention is *mala fide* in the circumstances of the case and therefore should be set aside. The Union contests the petitions and urges that *Rameshwar Shaw's case*² has no application to the present cases and that there was no *mala fide* intention in making the orders of detention.

We shall first consider whether the orders in the present cases are covered by the decision of this Court in *Rameshwar Shaw's case*¹, and should therefore be set aside. It is necessary in this connection to refer to the facts in that case. *Rameshwar Shaw* was ordered to be detained by an order passed on 9th February, 1963. This order was served on him on 15th February, 1963. At that time he was in Burdwan

jail. He had been in that jail for sometime past in connection with a criminal complaint pending against him. Therefore, both when the order was passed and when it was served on Rameshwar Shaw, he was already in jail in connection with the criminal case pending against him and it was not known how long he would remain in jail in that connection. It was also impossible to say at that stage whether he would be convicted in the criminal case or acquitted. It may be mentioned that that was a case of detention under the Preventive Detention Act where grounds and particulars are supplied to the detenu. But the main question that was decided therein was that where a person was already in jail for an indefinite length of time in connection with a criminal case pending against him it would not be possible for the authority to come to the conclusion that such a person's detention is necessary in order to prevent him from acting in a manner prejudicial to the public safety etc. It was pointed out that the scheme of the section postulates that if an order of detention is not passed against a person he would be free and able to act in a prejudicial manner; but when the person against whom an order is passed is already in jail for an indefinite length of time or for a long time to come (say when he is undergoing sentence of imprisonment for a number of years) it could hardly be said that such a person would act in a manner prejudicial to the public safety etc. unless he is detained. In such a case preventive detention would be unnecessary for the person concerned is already in jail for an indefinite length of time or for a long time. In *Rameshwar Shaw's case*¹, he was in jail in connection with the criminal case pending against him for an indefinite length of time. It was in those circumstances that this Court held that the authority ordering detention could not legitimately come to the conclusion that the detention of the person was necessary to prevent him from acting in a manner prejudicial to the public safety etc., for in coming to that conclusion the authority had to be satisfied that if the person is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time. If such a person was already in jail custody for an indefinite length of time it could not be postulated about him that if he was not detained he would act in a prejudicial manner.

This matter was again considered by this Court in *Smt. Godavari, Shamrao v. The State of Maharashtra*². That was a case where a certain person had been detained under the Defence of India Rules. Later, this order was revoked and another order was passed to remove some technical defects. The latter order was challenged as illegal as it was passed at the time when the person concerned was in detention and it was also served on her in jail. This Court held that the second order of the State Government after it had decided to revoke the earlier order was perfectly valid so far as the time of making the order was concerned and its service on the detenu (who was detained not as an undertrial or as a convicted person) could not be assailed, and the *Case of Ramaeshwar Shaw*¹, was distinguished.

It will be noticed that the facts of the present two cases differ from the facts of *Rameshwar Shaw's case*¹, in one material particular. Rameshwar Shaw was in jail in connection with the criminal case pending against him for an indefinite duration. The order of detention as well as the service of that order was made on Rameshwar Shaw when he was in jail for an indefinite period in connection with the criminal case pending against him. In the present cases it is true that the petitioners had been in jail for about three months before the order of detention was made against them. But there is a significant difference in the present cases, namely, that the executive authorities had decided that the criminal case against the petitioners could not succeed for want of sufficient evidence and applied for the discharge of the petitioner. It was in those circumstances that the executive authorities decided to pass an order of detention. So on 11th March, a report was made to the Magistrate that the petitioners should be discharged as there was not sufficient evidence for their conviction and on the same date the order for their detention was passed under the Rules. Further it was served on the petitioners immediately after their release from jail.

1. AIR 1964 SC 334.

2. (1965) 2 S.C.J. 523 AIR 1964 SC 1128
See also 1964 SC 17.

In these circumstances, the *ratio decidendi* of *Rameshwar Shaw's Case*¹, will not apply, for the authorities had decided to drop the criminal case and ask for the discharge of the accused. Then they considered whether there was justification for the detention of the petitioners under the Rules and decided to detain them. As was pointed out by this Court in *Rameshwar Shaw's case*¹, detention is made generally in the light of the evidence about the past activities of the person concerned. But these past activities should ordinarily be proximate in point of time in order to justify the order of detention. In the present cases the petitioners had been in jail for only three months before the order of detention was passed. It cannot be said that the conduct of the petitioners before this period of three months is not proximate enough to justify an order of detention based on that conduct. As a matter of fact, the affidavit on behalf of the Government of India is that the material in respect of the activities of the petitioners ranged over a period of two years before the date of detention and that was taken into account to come to the conclusion whether the detention under the Rules was justified or not. We are therefore of opinion that the petitioners cannot get advantage of the decision of this Court in *Rameshwar Shaw's case*¹, on the facts in the present cases.

The next contention on behalf of the petitioners is that the order is *mala fide*. The reason for this contention is that it was originally intended to prosecute the petitioners under section 3 of the Official Secrets Act and when the authorities were unable to get sufficient evidence to obtain a conviction they decided to drop the criminal proceedings and to order the detention of the petitioners. This by itself is not sufficient to lead to the inference that the action of the detaining authority was *mala fide*. It may very well be that the executive authorities felt that it was not possible to obtain a conviction for a particular offence under the Official Secrets Act; at the same time they might reasonably come to the conclusion that the activities of the petitioners which had been watched for over two years before the order of detention was passed were of such a nature as to justify the order of detention. We cannot infer merely from the fact that the authorities decided to drop the case under the Official Secrets Act and thereafter to order the detention of the petitioners under the Rules that the order of detention was *mala fide*. As we have already said, it may not be possible to obtain a conviction for a particular offence; but the authorities may still be justified in ordering detention of a person in view of his past activities which will be of a wider range than the mere proof of a particular offence in a Court of law. We are not therefore prepared to hold that the orders of detention in these cases were *mala fide*.

The petitions therefore fail and are hereby dismissed.

K.S. SUBRAMANIAM *Petition dismissed.*

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

Matukdhari Singh and others

.. Appellants*

v.

Janardan Prasad

.. Respondent.

Criminal Procedure Code (V of 1898), section 417 (3)—Appeal against acquittal—Power of High Court to set aside acquittal and order retrial—Trial Court omitting charge for serious offence (disclosed by evidence) which would be beyond its jurisdiction and acquitting on lesser charges within jurisdiction—Power to order retrial.

A retrial may be ordered for a variety of reasons. The Code of Criminal Procedure gives a wide discretion and deliberately does not specify the circumstances for the exercise of the discretion because the facts of cases that come before the Courts are extremely dissimilar.

However hesitant the High Court may be to set aside an order of acquittal and to order retrial, it has jurisdiction under the Criminal Procedure Code to do so, if the justice of the case clearly demands it and a case of omission from the charge of a serious offence *prima facie* disclosed by evidence, is one of those circumstances in which the power can properly be exercised particularly when the charge for the offence if framed, would have ousted the Court of trial of its own jurisdiction.

Dr. Sammukh Singh Teja Singh Yogi v. Emperor, AIR 1945 Sind 125 approved.

Appeal by Special Leave from the Judgment and Order, dated 10th August, 1964 of the Patna High Court in Criminal Appeal No. 66 of 1962.

R. K. Garg, S. C. Agarwala and D. P. Singh, Advocates for *Mrs. Ramamurthi & Co.*, for Appellants.

D. Goburdhun, Advocate, for Respondent.

At the conclusion of the hearing, the Court made the following

ORDER†—This appeal is dismissed. The record shall be returned to the trial Court for disposal according to law. We shall give our reasons later.

The Judgment of the Court was delivered by

Hidayatullah, J.‡—By an order pronounced on 7th May, 1965, we ordered the dismissal of this appeal but reserved our reasons which we now proceed to give.

The five appellants were tried on a complaint by the respondent Janardan Prasad before the Honorary Magistrate, First Class, Jehanabad for offences under sections 420, 468, 406, 465/471, Indian Penal Code. They were acquitted on 31st August, 1962. The complainant obtained Special Leave of the High Court at Patna under section 417 (3) of the Code of Criminal Procedure and filed an appeal against their acquittal. The High Court set aside the acquittal and remanded the case to the District Magistrate of Gaya with a direction that the case be inquired into under Chapter XVIII of the Code from the stage of taking evidence under section 208, with a view to their committal to the Court of Session. The appellants now appeal by Special Leave against the judgment and order of the High Court. The facts of the prosecution case may now be stated briefly.

Janardhan Prasad and his brother Jangal Prasad were separate, having, prior to the present occurrence, partitioned their lands by metes and bounds. Plots Nos. 1810 and 1811 in village Kalpa Kalan fell to the share of Jangal and plot No. 1699 in the same village fell to the share of Janardan. Jangal Prasad's plots lie close to the *dalan* of Matukdhari and his brothers Rameshwar Singh and Dhankukdhari Singh (the first three appellants) and they coveted them. Janardhan alleged that they forged a sale deed in respect of half the area of those two plots and presented the documents for registration. Janardhan was aggrieved but on the intercession of Deoki Lal and Chhedi Lal (appellants 4 and 5) the dispute was compromised and it was agreed that Janardhan would execute a sale deed for plot No. 1699 and

* CrI A No. 26 of 1965.

† 7th May, 1965.

‡ 20th July, 1965

half of another plot No. 1491 while Matukdhari and his brother Dhanukdhari Singh agreed to sell in return, 0.10 acre in one of their plots (No. 1797) to him. The complainant executed two sale deeds in respect of the two said plots and Dhanukdhari Singh executed a sale deed in respect of plot No. 1797 as it was in his name. The latter sale deed was taken in favour of Janardhan's son. All documents were scribed by Deoki Lal with the help of Chhedil Lal and were presented for registration. The receipts obtained from the Registration Office were left with Deoki Lal till the result of the first registration case (which was fixed for 8th February, 1960) was known. When Janardhan asked for the receipts he was put off. He found later that the two documents had already been withdrawn by forging his signature. Matukdhari had withdrawn the deed executed by Janardhan and Dhanukdhari the sale deed executed by himself. The complainant was assured by Deoki Lal and Chhedilal that the deed executed in favour of his son would be returned by Rameshwar Singh with whom, it was said to be, lying, but Rameshwar Singh refused to do so. The complaint was, therefore, filed.

The Sub-Divisional Officer, Jehanabad took cognizance under sections 468, 406 and 420, Indian Penal Code, and sent the case to the Honorary Magistrate for disposal. The Honorary Magistrate drew up charges against all the accused under section 420, Indian Penal Code. In addition, Chhedilal and Deoki Lal were charged under section 468, Indian Penal Code and section 406, Indian Penal Code respectively. Matukdhari was charged under sections 465/471, Indian Penal Code. These charges could be tried by the Honorary Magistrate. No charge under section 467, Indian Penal Code was framed against any of the appellants. If it had been framed the case had to be committed to the Court of Session. On 29th March, 1962 the complainant, by a written application, asked that action under Chapter XVIII of the Code be taken but the Magistrate declined to commit the accused. Another application dated 28th June, 1962, for the same purpose was also rejected. The learned Magistrate held that the evidence of entrustment of the receipts from the office of the Registrar was not satisfactory and Deoki Lal could not be convicted under section 406, Indian Penal Code. He further held, mainly on the ground that no handwriting expert was examined, that it was not possible to say that there was forgery of the signatures or that Matukdhari had used the receipts knowing them to be forged. On these findings the appellants were acquitted.

In his appeal before the High Court the complainant contended that the trial before the Magistrate was without jurisdiction, as the Magistrate should have acted under Chapter XVIII with a view to committing the accused to the Court of Session for trial as the facts disclosed an offence under section 467, Indian Penal Code, which is triable exclusively by the Court of Session. He contended that the offence was made out on his evidence and as registration receipts were valuable securities under section 30 of the Indian Penal Code a charge under section 467, Indian Penal Code should have been framed. This argument found favour with the High Court and it was held that although section 467, Indian Penal Code, was not mentioned in the complaint, a charge under that section ought to have been framed. The High Court pointed out that it was the duty of the Magistrate to apply the correct law and if the facts disclosed an offence exclusively triable by the Court of Session he ought to have framed that charge and not assumed jurisdiction over the case by omitting it. In the opinion of the High Court a *prima facie* case existed for framing a charge under section 467, Indian Penal Code, which meant that the case ought to have been committed to the Court of Session. The acquittal was, accordingly, set aside and retrial ordered. In this appeal the judgment is assailed as erroneous and against the principles laid down by this Court for dealing with appeals against acquittals.

Mr. Garg relies strongly upon two cases of this Court. They are *Abinash Chandra Bose v. Bimal Krishna Sen and another*¹ and *Ukha Kolhe v. State of Maharashtra*².

¹ (1964) 2 S.C.J. 285; (1964) M.L.J. (Cr.) 483. (1963) 3 S.C.R. 564 A.I.R. 1963 S.C. 316

² (1964) 1 S.C.R. 926; A.I.R. 1963 S.C. 1531.

He contends that the trial before the Magistrate, in so far as it went, was with jurisdiction and it could not be set aside merely because the High Court thought that a charge under section 467, Indian Penal Code might have been framed. He contends that such a proceeding is not contemplated under section 423 (1) (a), Criminal Procedure Code as explained by this Court in the two cases cited above. He further refers to *Barhamdeo Rai and others v. King-Emperor*¹, *Balgobind Thakur and others v. King Emperor*² and *K. E. v. Razya Bhagwanta*³ as instances where, the trial being with jurisdiction, no retrial was ordered even though it was submitted to the High Court that some other offences triable exclusively by the Court of Session with which accused could be charged, were also disclosed. These cases need not detain us. They do not deny the power of the High Court to order a retrial. The High Courts in those cases did not order a retrial because the accused were convicted of lesser offences and the sentences imposed were considered adequate in all the circumstances of those cases.

The two cases of this Court were considered by us in *Rajeswar Prasad Misra v. State of West Bengal*⁴. We have pointed out there that a retrial may be ordered for a variety of reasons which it is hardly necessary or desirable to state in a set formula and the observations of this Court are illustrative but not exhaustive. The Code gives a wide discretion and deliberately does not specify the circumstances for the exercise of the discretion because the facts of cases that come before the Courts are extremely dissimilar. We pointed out that it would not be right to read the observations of this Court (intended to illustrate the meaning of the Code) as indicating in advance the rigid limits of a discretion which the Code obviously intended should be developed in answer to problems as they arise. We gave some illustrations of our own which fell outside those observations but which might furnish grounds, in suitable cases, for an order of retrial. This case also furnishes an example which may be added to that list. The High Court pointed out that there was evidence that the endorsements on the receipts were not made by Janardhan. Janardhan denied on oath that he had written them and stated that they were written by one of the respondents, with whose handwriting he claimed to be familiar. There was *prima facie* evidence to show that the two deeds which were presented for registration were taken out on the strength of forged receipts. No suggestion was made to Janardhan in cross-examination that he had endorsed the receipts in favour of Matukdhari or Dhanukdhari. If he had not written the endorsements, some one else must have done so. No doubt handwriting experts could have been examined. The Magistrate could have taken action under section 73 of the Indian Evidence Act but this was not done. If the Magistrate had applied his mind to the problem he would have seen easily that a *prima facie* case of forgery was made out. He should then have considered whether the receipts were valuable security or not. If he had done that he would have seen that the main offence would *prima facie* be one under section 467, Indian Penal Code read with section 471 and the other offences were subsidiary. It was thus not proper for him to choose for trial only such offences over which he had jurisdiction and to ignore other offences over which he had none. His duty clearly was to frame a charge under section 467, Indian Penal Code and to commit the appellants to stand their trial before the Court of Session.

It was open to the High Court, while hearing an appeal under section 417 (3) of the Code to direct the Magistrate to frame a charge for an offence which was *prima facie* established by the evidence for the prosecution and also to order that the accused be committed to the Court of Session. It is wrong to contend that the High Court had no jurisdiction in the matter because the trial before the Honorary Magistrate (in so far as it went) was with jurisdiction. If it were so there would be no remedy whenever a Magistrate dropped serious charges ousting him of his jurisdiction and tried only those within his jurisdiction. The High Court followed a case of the Sind Chief Court reported in *Dr. Sanmukh Singh Teja Singh Yogi v. Emperor*⁵.

1. A.I.R. 1926 Pat 36.

2. A.I.R. 1926 Pat 393.

3. (1902) 4 Bom L.R. 267 (2)

4. (1966) M.L.J. (Cr) 94; (1966) 1 S.C.J. 150.

5. A.I.R. 1945 Sind 125

where retrial was ordered in very similar circumstances. We were referred to that ruling and on reading it we do not think the High Court was wrong in accepting it as a correct precedent. For, however hesitant the High Court may be, to set aside an order of acquittal and to order retrial, it has jurisdiction under the Code to do so, if the justice of the case clearly demands it and a case of omission from the charge of a serious offence *prima facie* disclosed by evidence, is one of those circumstances in which the power can properly be exercised particularly when the charge for the offence, if framed, would have ousted the Court of trial of its own jurisdiction.

Mr. Garg submitted finally that acquittals are not set aside in other jurisdictions and cited the example of English Criminal Law. He submitted further that the setting aside of an acquittal with a view to holding a second trial robs the accused "of the reinforcement of the presumption of innocence which is the result of the acquittal." As to the first submission it is sufficient to say that in our criminal jurisdiction a retrial is possible and we need not be guided by other jurisdictions. No doubt the High Court must act with great care and caution and use the power sparingly and only in cases requiring interference. As to the second it is not necessary to consider how the presumption of innocence is reinforced by an acquittal and to what extent. The phrase in any event is hardly apt to describe a case where the accused is acquitted perversely, or without jurisdiction. All that can be said is that these appellants were presumed to be innocent at their first trial and will not be thought less so at their second trial till their guilt is established legally and beyond all reasonable doubt.

In our judgment the High Court acted within its jurisdiction when it set aside the acquittal of the appellants and made an order for their retrial in the terms it did.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—K. N. WANCHOO, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Raja Bhanu Pratap Singh

*Appellant**

v.

The Assistant Custodian, Evacuee Property, Bahraich

Respondent.

Administration of Evacuee Property Act (XXXI of 1950), as amended by Act (XCI of 1956), section 10 (2)(n)—Powers and duties of Custodian—Custodian entitled to entertain claim of money decree-holder against evacuee—Amendment of clause (m) and deletion of Rule 22—Effect.

The words used in clause (n) of section 10(2) of the Administration of Evacuee Property Act empowering the Custodian to pay to "any other person" any sums of money out of the funds in his possession are not restricted to persons who are members of the family of the evacuee, they include other persons as well who are entitled to receive money from the evacuee, as for instance the holder of a money decree against the evacuee. It cannot be said that because of the amendment made in 1956 in section 10(2) (m) deleting the words "or of any amounts due to any employee of the evacuee or of any debt due by the evacuee to any person" and deletion in 1956 of Rule 22 setting up machinery for registration of debts, the powers of the Custodian to pay the debts have been restricted.

If power to pay the debts was derived under both clauses (m) and (n) deletion of the provision which authorised the Custodian to pay debts due by the evacuee to any person from clause (m) and of Rule 22 setting up machinery for registration of debts did not affect the power which is conferred by clause (n) of sub-section (2) and also by section 10 (1). The power to administer is not merely a power to manage on behalf of the evacuee so as to authorise the Custodian merely to collect the assets

of the evacuee, but to discharge his obligations as well. The power to administer for the purposes mentioned, having regard to the diverse clauses in sub-section (2) include the power to pay such debts which in the opinion of the Custodian are binding upon the evacuee.

The decree of the Civil Court is not decisive of the question, whether a person making a claim is entitled to the sum of money claimed by him. It is for the Custodian to determine whether the claimant is entitled to receive the money claimed by him out of the funds in his possession. He has to form his "opinion" on this question. Of course in forming his opinion he must act judicially and not arbitrarily.

Appeal by Special Leave from the Judgment and Order, dated 22nd January, 1962 of the Deputy Custodian-General of India, New Delhi, in No. 472/R/UP/61.

S. S. Shukla, Advocate, for Appellant.

Gopal Singh and *R. N. Sachthey*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Rani Manraj Koer obtained money decrees in two suits Nos. 9 of 1932 and 42 of 1932 filed by her in the Court of the Subordinate Judge, Lucknow against Nawab Mohammad Ali Khan Qazilbash Zamindar, Aliabad Estate, in Uttar Pradesh. From time to time execution applications were filed by the decree-holder against the Zamindar, but nothing was recovered. Rani Manraj Koer died on 1st October, 1941 and the appellant was brought on the record as her heir and legal representative. Nawab Mohammad Ali Khan Qazilbash also died and five persons amongst whom was one Nawab Ali Raza Khan were impleaded as legal representatives in the execution proceedings.

In January, 1950, Nawab Ali Raza Khan (Talukdar of Aliabad Estate) who was substantially the only judgment-debtor from whose estate the amounts due were liable to be recovered, migrated to Pakistan and he was declared an evacuee under the provisions of the Administration of Evacuee Property Ordinance XXVII of 1949—which was later replaced by the Administration of Evacuee Property Act XXXI of 1950. The Custodian of Evacuee Property took possession of the estate of the evacuee and applied to the Civil Judge, Lucknow for removal of attachment levied on the estate by the Civil Judge, Bahraich in execution of the decrees at the instance of the appellant. The Civil Judge, Lucknow, by order dated 22nd July, 1950 directed that the "transfer certificate" issued in the two decrees be recalled and the papers be consigned to the record. Against the order passed by the Civil Judge, Lucknow appeals were preferred by the appellant to the High Court at Allahabad. By order, dated 22nd February, 1960 the High Court held that after the Custodian entered upon the management of the properties of the evacuee by virtue of section 17 of the Administration of Evacuee Property Act, so long as the property remained vested in the Custodian under the provisions of that Act it was not liable to be proceeded against in any manner whatsoever in execution of any decree or order of any Court or other authority.

On 27th September, 1960 the appellant applied to the Custodian for an order under section 10 (2) (n) of the Administration of Evacuee Property Act, 1950, directing that his claim for Rs. 1,27,638-20 under the two decrees in Suits Nos. 9 of 1932 and 42 of 1932 be satisfied out of the assets belonging to the estate of Nawab Ali Raza Khan. The Assistant Custodian-General, Evacuee Property, U.P., Lucknow, exercising the powers of the Custodian rejected the application holding that he had no power to grant relief to the appellant of the nature claimed. In exercise of his revisional jurisdiction, the Custodian-General, Evacuee Property, New Delhi, confirmed the order, and the appellant has, with Special Leave, appealed against that order.

The question which falls to be determined in this appeal is, whether the Custodian is entitled to entertain the claim of the holder of a money decree against the evacuee for satisfaction of his dues out of the assets vested in the Custodian by section 7 of the Administration of Evacuee Property Act. The Custodian held that he had no such power, and the Custodian-General agreed with him. Section 10

ment has deliberately taken away the power to entertain a claim for satisfaction of debts due by the evacuee. Section 10 (2) (m), as it originally stood, provided :

“incur any expenditure, including the payment of taxes, duties, cesses and rates to Government or to any local authority, or of any amounts due to any employee of the evacuee or of any debt due by the evacuee to any person.”

Under Rule 22 made in exercise of the powers under section 56 of the Act, provision was made for registration of claims by persons claiming to receive payment from any evacuee or from any property of such evacuee, whether in re-payment of any loan advanced or otherwise, by presenting a petition to the Custodian. The Custodian was entitled to register a claim under clause (2) where it was supported by a decree of a competent Court or a registered deed executed and registered before 14th August, 1947 or by registered deed executed and registered on or after 14th August, 1947, and the transaction in respect of which the deed was so executed and registered had been confirmed by the Custodian, or where an acknowledgment in writing was executed by the evacuee himself before the 1st March, 1947, or where such claim was of the nature referred to in the *Explanation* to sub-rule (1) and the transfer of property in respect of which the claim was made was a *bona fide* transaction. If the claim did not fall under sub-rule (2) the Custodian had to direct the claimant to establish his claim in a civil Court. Sub-rules (3) and (4) provided :

“(3) The mere registration of a claim shall not entitle the claimant to payment and the Custodian may for reasons to be recorded refuse payment.

(4) No debt incurred by the evacuee before the property vested in the Custodian shall be paid without the sanction of the Central Government or Custodian-General.”

The *Explanation* to sub-rule (4) set out cases in which the sanction of the Central Government was not necessary.

The Administration of Evacuee Property Act, 1950, was amended by Act XCI of 1956 and the words “or of any amounts due to any employee of the evacuee or of any debt due by the evacuee to any person” in section 10 (2) (m) were deleted. The Central Government thereafter issued on 20th February, 1957 an order deleting Rule 22. Relying upon this legislative development, it was contended, that an express power to entertain a claim for satisfaction of debts due by the evacuee was conferred upon the Custodian by section 10 (2) (m), and machinery was provided for effectuating the exercise of that power in Rule 22, and the Legislature having deleted the clause which authorised the Custodian to exercise the power to pay debts and the machinery in that behalf, no such power remained vested in the Custodian.

We are, however, unable to agree that because of the amendment made in section 10 (2) (m) and the deletion of Rule 22 the power which is vested in the Custodian under section 10 (2) (n) must be held restricted. Sub-section (1) of section 10 sets out the powers of the Custodian generally, and the diverse clauses in sub-section (2) illustrate the specific purposes for which the powers may be exercised, and there is no reason to think that the clauses in sub-section (2) are mutually exclusive. If power to pay the debts was derived both under clauses (m) and (n) as it appears it was, deletion of the provision which authorised the Custodian to pay debts due by the evacuee to any person from clause (m) and of Rule 22 setting up the machinery for registration of debts did not, in our judgment, affect the power which is conferred by clause (n) by sub-section (2) and also by section 10 (1). In our judgment, the power to administer is not merely a power to manage on behalf of the evacuee so as to authorise the Custodian merely to recover and collect the assets of the evacuee, but to discharge his obligations as well. The power to administer for purposes mentioned, having regard to the diverse clauses in sub-section (2), includes the power to pay such debts which in the opinion of the Custodian are binding upon the evacuee. Specific enunciation of that power in clause (n) authorising the Custodian to pay to any other person who in the opinion of the Custodian is entitled to any sum of money supports that conclusion.

As already observed, the decree of the civil Court is not decisive of the question whether a person making a claim is entitled to the sum of money claimed by him. It is for the Custodian to determine whether the claimant is entitled to receive the sum of money claimed by him out of the funds in his possession. He has to form his "opinion" on this question; of course in forming his opinion he must act judicially and not arbitrarily. As the Tribunals below have determined the claim raised before them only on the question of jurisdiction to entertain it and not on the merits, we are unable to pass any effective order in favour of the appellant. The orders passed by the Custodian and the Custodian-General must therefore be set aside and the proceeding remanded to the Custodian to determine the question whether in the opinion of the Custodian the appellant is entitled to any sum of money out of the funds in his possession and whether for the purpose of administration and management of the evacuee property or for enabling him to satisfactorily discharge his duties under the Act the amount claimed should be paid.

The appeal is therefore allowed. The appellant would be entitled to his costs in this appeal from the Custodian.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—A.K. SARKAR, N. RAJAGOPALA AYYANGAR AND R. S. BACHAWAT, JJ.

Roshan Lal and others

.. *Appellants**

v.

The State of Punjab

.. *Respondent.*

Penal Code (XLV of 1860), section 201—Offence under—Ingredients—Measure of punishment—Determination of—Relevant factors.

Per majority (*A. K. Sarkar, J.*, inclining to dissent but not expressing a final opinion).—The first paragraph of section 201 of the Penal Code lays down the essential ingredients of the offence under section 201. It must be proved firstly that an offence has been committed. Secondly, the accused must know or have reason to believe that the offence has been committed. Thirdly, the accused must either cause any evidence of the commission of that offence to disappear or give any information respecting the offence which he knows or believes to be false. Fourthly, the accused must have acted with the intention of screening the offender from legal punishment. By the second, third and fourth paragraphs the measure of the punishment is made to depend upon the gravity of the offence. The word "offence" wherever used in the first, second, third and fourth paragraphs means some real offence, which in fact has been committed and not some offence which the accused imagines has been committed. The punishment depends upon the gravity of the offence which was committed and which the accused knew or had reason to believe to have been committed. If an accused on seeing blood marks on the ground made as a result of an offence punishable under section 323, Penal Code, erases the blood marks with the intention of screening the offender whom he erroneously believes to have committed the offence of murder, he could be convicted only on the footing that an offence under section 323 was committed and that he acted with the intention of screening such an offender believing that such an offence was committed, and he may be punished accordingly under the fourth paragraph with imprisonment extending to three months, but he could not be convicted on the basis of his having screened a murderer merely because he wrongly imagined that an offence of murder had been committed. If punishment under section 201 could be made to depend on the belief of the accused as to the offence committed the erroneous belief or delusion of the accused would furnish the measure of punishment, and he would be punishable under the second paragraph with imprisonment extending to seven years. It is difficult to impute such an intention to the Legislature and to hold that the minor offence of screening an offender under section 201 is punishable more severely than the main offence committed by the main offender. It does not stand to reason that section 201 provides for punishing a minor offence more severely than the principal offence.

Section 201 is somewhat clumsily drafted by the expression "knowing or having reason to believe" in the first paragraph and the expression "knows or believes" in the second paragraph are used in the same sense.

When by the same act the accused causes the evidence of two offences to disappear, strictly he will be guilty of two offences under section 201. But normally no Court should award two separate punishments for the same act constituting two offences under section 201.

Appeal by Special Leave from the Judgment and Order dated 21st May, 1964 of the Punjab High Court in Criminal Appeal No. 598 of 1963.

N. S. Krishna Rao and Gurish Chandra, Advocates, for Appellants.

R. N. Sachthey, Advocate, for Respondent.

The Court delivered the following Judgments

Sarkar, J.—There are three appellants in this case. They had been prosecuted for various offences under the Indian Penal Code and acquitted by the trial Court. On appeal, the High Court of Punjab convicted the appellant Roshan Lal, a Sub-Inspector of Police, under sections 330 and 348 of the Code. The High Court also convicted all the three appellants under section 201 of the Code. This appeal is against the judgment of the High Court with Special Leave. That leave was however confined only to the question as to the legality of the term of imprisonment imposed under section 201.

The High Court found that Roshan Lal, with a police party which included the two other appellants one of whom was an Assistant Sub-Inspector and the other a Police Constable, arrested a man called Raja Ram on a public street on suspicion that he was an opium smuggler, took him to his house and when no contraband opium was found there, the appellant Roshan Lal got very angry and hit him on the head with his baton which injured his eye. In respect of this injury the appellant Roshan Lal was convicted on one count under section 330 of the Code. After this beating Raja Ram was taken by the police party to the police station and kept confined in a room there for the night and was there beaten by Roshan Lal assisted by some policemen. It was however not found that the other two appellants had taken any part in administering this beating to Raja Ram. In respect of this beating the appellant Roshan Lal was convicted by the High Court on a second count under section 330 read with section 34 of the Code and also under section 348 for wrongful confinement of Raja Ram with a view to extort a confession. Next morning Raja Ram was found dead in the room in a pool of blood. The three appellants thereafter carried his dead body to a jungle, burnt it up and collected the bones and ground them in a pestle and mortar and threw the remnants in a canal. In respect of the disposal of the body and thereby destroying the evidence of offences committed upon Raja Ram the appellants were convicted under section 201 of the Code. Each of the appellants was sentenced for the offence under section 201 to rigorous imprisonment for three years.

The only question in this appeal is whether the appellants could have been awarded a sentence of imprisonment for three years under section 201. That section is in these terms :

Section 201.—Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,

shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ;

and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

The appellants contended that the sentence imposed was not justified by the section, for the offences found to have been committed were under sections 330 and 348, and, therefore, the fourth paragraph of the section applied and under it the sentence could not exceed one-fourth of the longest term of imprisonment for the offences under sections 330 and 348. It was said that on this basis, the longest term of imprisonment that could be imposed in the present case would be one year and nine months and not three years as was done.

The contention of the respondent State was that the term of imprisonment that could be imposed under section 201 did not depend on the actual offences committed the evidence of which had been destroyed but on what the accused believed that offence to have been and therefore the sentence imposed in the present case was fully within its terms and the matter had to be governed by the third paragraph of the section. Learned Advocate for the State contended that the words "the offence" in the third and fourth paragraphs meant the offence mentioned in the second paragraph. The second paragraph speaks of "the offence which he knows or believes to have been committed" and therefore the word "offence" in the last two paragraphs must refer to the offence which the person accused under section 201 either knew or believed to have been committed. It seems to me that so far the contention of the State is unassailable. It is not necessary to consider a case where it is known what the offence committed is, for it is not disputed that the punishment has there to depend on that offence. The argument on behalf of the State was that if section 201 did not intend that punishment under it could be made to depend on the belief as to the offence committed, then the words "which he.....believes to have been committed" would be rendered completely otiose. It was said that an interpretation cannot be accepted which would result in a part of the language used being rendered ineffective. As at present advised, I am inclined to agree with this reasoning though for reasons later discussed, I find it unnecessary to express a final opinion on it on the present occasion.

On behalf of the appellants it was contended first, that in order that an offence under section 201 might be committed there must be another offence actually committed. It was indeed so held by this Court in *Palvinder Kaur v. State of Punjab*¹ and by a Full Bench of the Allahabad High Court in *Empress of India v. Abdul Kadir*². I find no reason to dispute that proposition. There must first be an actual offence in order that there may be evidence of it which is destroyed. Further it cannot be the intention of a law creating criminal offences that a person may be guilty only because he believed that what he was doing constituted an offence though it was not in fact so. Both these aspects of the question were mentioned in the judgment of the Allahabad High Court. But I am unable to see that the fact that an actual offence has to be committed furnishes an answer to the contention for the State. Suppose an offence is committed but is believed to be of a graver nature than it actually is. There can be no objection in principle in such a case to a law which makes the punishment of the person who destroys the evidence of that offence to depend on what he believed it to have been. The person is not being convicted under that law because he believed what he was doing was an offence while it was in fact not; he did commit an actual offence by destroying the evidence of another actual offence and all that the law does is to permit the imposition of a term of imprisonment according to his belief.

Learned Advocate for the appellants then said that in view of the words "having reason to believe that an offence has been committed" in the first paragraph of the section the contention on behalf of the State could not be accepted. It was said that if the contention of the State was accepted, it would be necessary to prove two states of mind, namely, first that he had reason to believe that an offence had been committed and secondly, what his belief as to the kind of that offence was. It was said that that would be anomalous. But this argument is to my mind unavailing, for the acceptance of the State's interpretation of the section does not lead to the

1. (1952) S.C.J. 545 (1953) S.C.R. 94, 102.

2. (1880) I.L.R. 3 All. 279 (F.B.).

conclusion that two states of mind of the offender have to be proved before an offence under the section can be punished. It seems to me that it may legitimately be said that the words "having reason to believe" had been used in the first paragraph which set out the elements constituting the offence, to provide the requisite guilty mind. Without such provision, if evidence of an actual offence was destroyed by a person without his having reason to believe that an offence had been committed and, therefore, without believing that he was destroying evidence of that offence, he would have been made liable though he had no guilty mind. That would be contrary to the principles of criminal law. Then I find it difficult to conceive that if a person has reason to believe that an offence had been committed, he would not at the same time have formed a belief as to the kind of that offence. If a person has reason to believe that an offence has been committed, he necessarily would have reason to believe what the offence committed was. "Having reason to believe that an offence has been committed" only means that a person must be taken to have believed that an offence has been committed. The latter is no different from the expression "the offence.....which he believes to have been committed" which occurs in paragraph 2 of the section. Therefore I think that the expressions "having reason to believe" and "he believes" refer to the same state of mind; proof of one is proof of the other. It does not seem to me that any anomaly can arise from the acceptance of the interpretation of the section suggested by learned Advocate for the State.

I have said that I am inclined to agree with learned Advocate for the State but I think it right also to observe that I find it difficult to imagine that it can ever be found that a person guilty of an offence under section 201, believed the offence of which he had destroyed the evidence, to have been of a higher degree than it actually was. That, however, is only a matter of proof. But even if we were to accept the interpretation suggested for the State, I think, we cannot in the present case uphold the sentence imposed. In order that that interpretation might assist the State, it has to be shown that the appellants believed that an offence under section 304 had been committed so that the case could be brought under paragraph 3. The High Court had not come to a finding that an offence under section 304 had been committed by the appellants; in fact they were acquitted of the charge under that section for causing the death of Raja Ram. The High Court did not even find that the appellants believed that an offence under section 304 had been committed. All that the High Court said was that "Raja Ram met his death by violence," without indicating who had committed that violence. It may be that the violence only caused a grievous hurt. The most that can on the facts be reasonably said against the appellants is that they knew or believed that an offence of grievous hurt had been committed on Raja Ram under section 325. The longest term of imprisonment that can be imposed under that section is seven years. The appellants could at most be given under the fourth paragraph of section 201 one-fourth of that term, namely, one year and nine months. A similar view was taken, it seems to me rightly, in *Chunna Gangappa*, In re¹.

I would, therefore, reduce the sentence passed under section 201 to one year nine months.

Bachawat, J. (on behalf of *Rajogopala Ayyangar, J.* and himself).—Appellants, Roshan Lal, Lachhman Singh and Kulwant Rai, were police officers attached to the police station, Jaito in District Bhatinda. Roshan Lal was the Sub-Inspector and Station House Officer, Lachhman Singh was the Assistant Sub-Inspector and Kulwant Rai was a Foot Constable. The appellants were charged with diverse offences under sections 330, 348, 330/34, 304, 342, 201 and 342/34 of the Indian Penal Code. The Trial Judge acquitted all the appellants. On appeal, the High Court found that on 24th December, 1961 at Raja Ram's house, Roshan Lal for the purpose of extorting information from Raja Ram as to the illegal possession of opium, gave a *danda* blow to Raja Ram and injured his eye, and had thereby

committed an offence under section 330, and that Roshan Lal was responsible for the illegal confinement of Raja Ram at the Jaito police station, and together with other police officers for the belabouring of Raja Ram during the night between the 24th and 25th December, 1961, and thereby committed offences under sections 348 and 330/34. Accordingly, the High Court convicted Roshan Lal of the offences under sections 330, 330/34 and 348 and passed appropriate sentences on him for those offences. The High Court also found that all the appellants

“knowing or having reason to believe that an offence has been committed and with the intention of screening the offender from legal punishment caused the evidence of an offence of culpable homicide and of offences under sections 330 and 348 of the Indian Penal Code, to disappear by burning clandestinely Raja Ram's dead body.”

On this finding, the High Court convicted all the appellants of the offence under section 201 and sentenced them to undergo rigorous imprisonment for three years. The High Court directed that the substantive sentences of Roshan Lal under sections 340, 348 and 201 would run consecutively. All the appellants now appeal to this Court by Special Leave, limited to the question of the legality of the sentence imposed under section 201.

The High Court found that Raja Ram met his death by violence on the afternoon of 25th December, 1961. The appellants were charged under section 304 for the offence of culpable homicide of Raja Ram not amounting to murder, but were acquitted on that charge. It was not established that the offence under section 304 was committed by the appellants or by anybody else. Section 201 presupposes a real offence, the evidence of which is made to disappear. As the appellants could not be convicted for causing the evidence of an imaginary offence under section 304 to disappear, they must be taken to have been convicted under section 201 for causing the evidence of offences under sections 330 and 348 to disappear. That they knew or believed those offences to have been committed is not disputed by Girish Chandra. Now, the longest term of imprisonment for an offence under section 330 is seven years. Mr. Girish Chandra, therefore, argued that the appellants could be punished under the fourth paragraph of section 201 with imprisonment for a term extending to one-fourth part of seven years and no more.

Mr. Sachthey, learned Counsel for the State, contended that though by the first paragraph of section 201, the conviction of the accused is dependent upon his “knowing or having reason to believe that an offence has been committed,” the second paragraph indicated that his punishment is according to “the offence which he knows or believes to have been committed,” that the second paragraph uses the somewhat different phrase to indicate that the punishment depends not so much on what offence, in fact, was committed, but on what the accused knew or believed to have been committed, that the appellants believed that not only the offences under sections 330 and 348 but also the offence under section 304 had been committed, and they are, therefore, liable to be punished under the third paragraph of section 201 with imprisonment extending to three years. In support of his contention, Mr. Sachthey relied on *Ghinna Gangappa*, In re¹. He rightly pointed out that the High Court proceeded on the assumption that the appellants had reason to believe that an offence under section 304 also had been committed. The correctness of this assumption is not challenged by Mr. Girish Chandra. We, therefore, proceed on the footing that this assumption is correct. Nevertheless, we cannot accept the construction of section 201 suggested by Mr. Sachthey and his contention that the appellants are punishable under the third paragraph of section 201 with imprisonment extending to three years.

Section 201 is somewhat clumsily drafted, but we think that the expression “knowing or having reason to believe” in the first paragraph and the expression “knows or believes” in the second paragraph are used in the same sense. Take the case of an accused who has reason to believe that an offence has been committed. If the other conditions of the first paragraph are satisfied, he is guilty of an offence:

1. (1931) 59 M.L.J. 677 : I.L.R. 54 Mad. 68.

under section 201. If it be supposed that the word "believes" was used in a sense different from the expression "having reason to believe," it would be necessary for the purpose of inflicting punishment upon the accused to prove that he "believes" in addition to "having reason to believe". We cannot impute to the Legislature an intention that an accused who is found guilty of the offence under the first paragraph would escape punishment under the succeeding paragraph unless some additional fact or state of mind is proved. In the instant case, the High Court recorded the finding that the appellants knew or had reason to believe that an offence had been committed. It did not record a separate finding that the appellants knew or believed that an offence was committed. If Mr. Sachthy's argument were accepted, the appellants would escape punishment altogether. But, in our opinion, it was not necessary to record such a separate finding.

The first paragraph of section 201 lays down the essential ingredients of the offence under section 201. It must be proved firstly that an offence has been committed. See *Palvinder Kaur v. State of Punjab*¹ and *Empress of India v. Abdul Kadir*². Secondly, the accused must know or have reason to believe that the offence has been committed. Thirdly, the accused must either cause any evidence of the commission of that offence to disappear or give any information respecting the offence which he knows or believes to be false. Fourthly, the accused must have acted with the intention of screening the offender from legal punishment. By the second, third and fourth paragraphs, the measure of the punishment is made to depend upon the gravity of the offence. The word "offence" wherever used in the first, second, third and fourth paragraphs means some real offence, which, in fact, has been committed and not some offence which the accused imagines has been committed. The punishment depends upon the gravity of the offence which was committed and which the accused knew or had reason to believe to have been committed. If an accused on seeing blood marks on the ground made as a result of an offence punishable under section 323, erases the blood marks with the intention of screening the offender whom he erroneously believes to have committed the offence of murder he could be convicted only on the footing that an offence under section 323 was committed and that he acted with the intention of screening such an offender believing that such an offence was committed, and he may be punished accordingly under the fourth paragraph with imprisonment extending to three months; but he could not be convicted on the basis of his having screened a murderer, merely because he wrongly imagined that an offence of murder had been committed. If the contention of the State were to be accepted, the erroneous belief or delusion of the accused would furnish the measure of punishment, and he would be punishable under the second paragraph with imprisonment extending to seven years. It is difficult to impute such an intention to the Legislature, and to hold that the minor offence of screening an offender under section 201 is punishable more severely than the main offence committed by the main offender. It does not, in our opinion, stand to reason that section 201 provides for punishing a minor offence more severely than the principal offence.

In the case of *Chinna Gangappa*, In re.³ the accused was charged also with the murder of his wife, but was acquitted on that. The death of the woman was due to blows by sticks or stones on her head. The accused knew the person who inflicted the injuries; nevertheless, with the intention of screening the real offender he gave false information that he suspected that the woman had been stung by a scorpion or bitten by a snake. The Sessions Judge, while acquitting the accused of the charge of murder, convicted him under sections 201 and 203 of the Indian Penal Code and sentenced him to rigorous imprisonment for five years. On appeal, the Madras High Court reduced the sentence to one year's rigorous imprisonment. Mr. Sachthy relies strongly on the following observations of the High Court:

"It is clear that for the purpose of calculating the punishment to be awarded under section 201, it is necessary for the Court to decide, not so much what offence—the evidence of which has been con-

1. (1952) S.C.J. 545; (1953) S.C.R. 94, 102. 3. (1931) 59 M.L.J. 677; I.L.R. 34 Mad 68.
2. I.L.R. 3 All 281. (F.B.).

ceased—has been committed, as what offence the accused knew or had reason to believe had been committed.”

We do not think that the passage supports the contention of Mr. Sachthey. It is clear that in this passage the Judges had in their mind the first paragraph of section 201 and not the second paragraph, as suggested by Mr. Sachthey, for they refer to the offence which the accused “knew or had reason to believe had been committed”. Literally read, the passage may suggest that the guilt under section 201 does not depend on what offence the accused knew or believed to have been committed and only the measure of punishment depends on that fact. We cannot agree with this construction of the passage. But we think that in the context of the entire judgment the passage really means that both the conviction and punishment under section 201 depend not so much on what offence was, in fact, committed, but on what the accused knew or had reason to believe to have been committed, and where a major offence was committed but the accused knew or believed that only a minor offence had been committed, it would be the minor offence that would furnish the measure of punishment ; for the Judges went on to say :

“From that point of view we cannot on the evidence say that more is proved than that the accused knew that someone had hit his wife and that she had died in consequence. We are unable to conclude that he knew that the person who struck her had the criminal intention of killing her. It must have been clear however to the accused that his wife had died as a result of the blows given and that she at least suffered grievous hurt, and that is punishable under section 325, Indian Penal Code, with imprisonment for seven years. Under section 201 the accused is then liable to be sentenced to a maximum of one-fourth of that seven years. The learned Sessions Judge has sentenced the accused to rigorous imprisonment for five years. At the most he can be sentenced to one year and three-fourths. We think that it will be sufficient if he undergoes imprisonment for one year and we reduce the sentence accordingly.”

It is reasonable to think, though the judgment is not explicit on this point, that the High Court found that the offence of grievous hurt under section 325 had been committed in the presence of the accused, and the accused knew that the offence had been committed and was, therefore, punishable with one-fourth of the maximum imprisonment of seven years provided for the offence under section 325. In this view of the matter, the ultimate conclusion of the Madras High Court may well be supported, though we cannot agree with the entirety of the observations.

Mr. Sachthey next contended that the appellants having caused the evidence of the two offences under sections 330 and 348 to disappear, committed two separate offences under section 201 and are punishable accordingly. Now, by the same act, namely, burning of the dead body of Raja Ram, the appellants caused the evidence of two offences to disappear. Taking a strict view of the matter, it must be said that by the same act the appellants committed two offences under section 201. The case is not covered either by section 71 of the Indian Penal Code or by section 26 of the General Clauses Act, and the punishment for the two offences cannot be limited under those sections. But, normally, no Court should award two separate punishments for the same act constituting two offences under section 201. The appropriate sentence under section 201 for causing the evidence of the offence under section 330 to disappear should be passed, and no separate sentence need be passed under section 201 for causing the evidence of the offence under section 348 to disappear. The maximum sentence for the offence under section 330 is imprisonment for seven years, and under the fourth paragraph to section 201, the appellants are liable to be sentenced to a maximum of one-fourth of seven years of imprisonment. The facts of the case call for the maximum sentence. Accordingly, the sentence passed on the appellants for the offence under section 201 should be reduced to a sentence of one year and nine months. Mr. Girish Chandra attempted to argue that the entire conviction of Roshan Lal under section 201 was illegal. But it is not open to him to argue this point, as the Special Leave is limited.

to the question of the legality of the sentence only. We are also not disposed to grant him leave to challenge the legality of the conviction at this stage.

In the result, the appeal is allowed in part, and the sentences passed on the appellants for the offence under section 201 of the Indian Penal Code are reduced to rigorous imprisonment for one year and nine months. In other respects, the judgment under appeal is affirmed.

V.K.

Appeal allowed in part.

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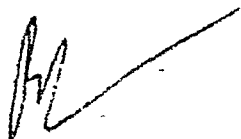
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THE OUTGOING AND INCOMING CHIEF JUSTICE OF INDIA.

Chief Justice Gajendragadkar is retiring from his exalted office as Chief Justice of India with effect from 16th March and Justice Amal Kumar Sarkar is the new Chief Justice in his place. Longevity of tenure has not been a characteristic of the Chief Justiceship of India so far. Within the last 17 years there have been as many as 7 Chief Justices and the eighth incumbent will have only about three months in office. There is thus but little time for a Chief Justice to leave the impress of his personality or make any impact on the administration of justice. Shri Gajendragadkar has been the Chief Justice of India for just over two years. He had been earlier a Judge of the Bombay High Court and thereafter a puisne Judge of the Supreme Court for about 8 years. His retirement will cause wide regret because within the relatively short period during which he has been the Chief Justice he has shown rare qualities and been a fearless expounder of the rule of law and the independence of the judiciary. It has been said that one of the Chief Justices of the United States of America remarked in regard to his office: "To me the Chief Justiceship of the United States is the most important job in the world". In a similar vein it may be said that Shri Gajendragadkar has regarded the Chief Justiceship of India, as perhaps the most important job in the country, particularly as conditions in a developing democracy are apt to throw up all types of ticklish problems concerning the area within which the different limbs of Government should function and its frontiers.

Endowed with a dynamic personality, great scholarship, powers of analysis and lucid expression his expositions of law have been vivid and luminous. He has evinced considerable interest in the system of administration of justice and has been constantly explaining the role of the judiciary and the part that lawyers should play in the context of the present day conditions. His outlook has been robust and his approach refreshing. He has never failed to draw inspiration from the scriptures. Addressing the members of the Bench and the Bar during his visit to Madras in 1964 he said that the administration of law in the context of India's position to-day should be regarded by Judges and Lawyers alike as the highest form of social service, that law is ultimately the servant of the society and we are the servants of the servant of the society, and it is in that sense that it should be borne in mind that the administration of the law and the work that we do in Courts is the highest kind of social service in India. He was anxious that the Courts should strive to be real temples of justice, that Judges should discharge their duties in a spirit of humility and that the lawyers should always conduct themselves as assisting in the securement of true justice. The Judiciary is the guardian of the conscience of the people no less than of the law of the land. It has no army to carry out its mandates and does not hold the strings of the purse. Its real strength lies essentially in the command it has over the minds and hearts of men.¹

Shri Gajendragadkar regarded law as a flexible instrument of social and economic change. In *Tata Engineering and Locomotive Co., v. State of Bihar*² apropos of the legal personality of a company or corporation, he observed: "The doctrine of the lifting of the veil...marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the corporation. As a

1. (1964) 2 M.L.J. (Journal) 3.

2. (1964) 1 S.C.J. 666 : (1964) 1 Comp L.J. 280.

result of the impact of the complexity of economic factors, judicial decisions have some times recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems the theory about the personality of the corporation may be confined more and more."

Shri Gajendragadkar would not allow the doctrine of precedents to operate rigidly. In *Keshav Mills, Ltd. v. C.I.T.*³ he laid down that while the principle of *stare decisis* cannot be pressed into service in cases where the jurisdiction of the Supreme Court to reconsider and revise its earlier decisions is invoked the Supreme Court would and should be reluctant to review and revise its earlier decisions unless considerations of a substantial and compelling character make it necessary to do so.

Perhaps the most striking thing about the learned Chief Justice was his anxiety to give a harmonious construction to the provisions of the Constitution which would avoid jolts in its actual working. He was a firm believer in the supremacy of the Constitution. In the great Opinion delivered by him in the *Reference under Article 143*⁴ he pointed out that in a democratic country governed by a written Constitution, it is the Constitution that is supreme and sovereign, that there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of citizens, and that in dealing with problems of importance and significance arising under it "we should proceed to discharge our duty without fear or favour, affection or ill will and with the full consciousness that it is our solemn obligation to uphold the Constitution and the laws". He added: "A Judge of a High Court who entertains or deals with a Petition challenging any order or decision of a Legislature imposing a penalty on the petitioner or issuing any process against the petitioner for its contempt or for infringement of its privileges and immunities, or who passes any order on such petition does not commit contempt of the Legislature; and the said Legislature is not competent to take proceedings against such a Judge in the exercise and enforcement of its powers, privileges and immunities."

Shri Gajendragadkar has shown keen interest in the reorganisation of law studies and legal education. It has been his endeavour to bring home to the lawyers the vital role which they can play in the public life of the country. There is no doubt that his retirement will create a void in the ranks of the Supreme Court judiciary which will take a long time to fill.

Mr. Justice A. K. Sarkar, the incoming Chief Justice, was called to the Bar from Lincoln's Inn (United Kingdom) and worked with the late Shri Sarat Chandra Bose as a member of the Bar in Calcutta. Later on in 1931 he worked as a junior to Shri S. R. Das, former Chief Justice of India. Shri A. K. Sarkar became a Judge of the Calcutta High Court in 1949 and ever since 1957 has been a Judge of the Supreme Court. He has a great reputation for the unfailing courtesy he extends to members of the Bar and the patience with which he listens to arguments addressed by the members of the Bar. Shri Sarkar will also be remembered for the dissenting judgment he delivered in the *Reference under Article 143 of the Constitution*.⁴ We are sure that Justice Sarkar will have the goodwill and co-operation of the entire Bar in the discharge of his new duties as the Chief Justice of India.

3. (1963) 2 S.C.J. 75 : (1965) 1 I.T.J. 853.

4. (1965) 1 S.C.J. 847.

THE SUPREME COURT JOURNAL

I]

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[1966

NOTES OF RECENT CASES

[SUPREME COURT.]

A. K. Sarkar, J. R. Mudholkar and
R. S. Bachawat, JJ.
2nd November, 1965.

Gopal Krishnan v.
The State of Jammu and Kashmir.
Cr.A. No. 73 of 1963.

Criminal Procedure Code (V of 1898), section 423—Appeal against acquittal.—Interference.

The appellate Court should not lightly interfere with the verdict of acquittal by the trial Judge, who has seen and heard the witnesses. The appellate Court has no right to reverse the order of acquittal on a misreading of the evidence. Unfortunately, we find that in this case the High Court has misread the evidence on vital points, and has set aside the order of acquittal on conjectures and surmises. We think that the High Court has given no cogent reasons for reversing the order of acquittal. On the whole, we think that the appellant is entitled to the benefit of doubt. Our conclusion is based upon the materials on the record of this case.

In the result, the appeal is allowed, the order of the High Court is set aside and that of the trial Court is restored. The appellant is acquitted of the offence under section 304-A of the Ranbir Penal Code. Fine, if paid, will be refunded, and his bail bond, if any, is cancelled.

U. M. Trivedi and M. M. Tewari, Senior Advocates (Ram Nath Balgotra, S. S. Khanduja and Ganpat Rai, Advocates, with him), for Appellant.

B. K. Khanna and R. N. Sachthey, Advocates, for Respondents.

G.R.

Appeal allowed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J.
J.C. Shah, S.M. Sikri,
V. Ramaswami and
P. Satyanarayana Raju, JJ.
21st January, 1966.

B.R. Sankaranarayana v.
State of Mysore.
C.As. Nos. 174, 177, 181 183,
186, 190, 191 and 194 of 1965.

Colourable Legislation—Mysore Village Offices Abolition Act, 1961 (XIV of 1961)—Madras Village Offices Act, 1895.

Relying upon its earlier decision in *K. G. Gajapati Narayan Deo v. The State of Orissa*, (1953) S.C.J. 592 : (1954) S.C.R. I, the Court held : "The whole doctrine of colourable legislation resolves itself into the question of competency of a particular Legislature to enact a particular law. If the Legislature is competent to pass the particular law, the motive which impels it to pass the law are really irrelevant. It is open to the Court to scrutinise the law to ascertain whether the Legislature by

device, purports to make a law, which, though in form appears to be within its sphere, in effect and substance, reaches beyond it."

Relying upon *Musti Venkata Jagannadha v. Musti Veerabhadrayya*, 41 M.L.J. 1, the Counsel for the appellant in C.A. No. 190 of 1965 submitted that the karnam under the Madras Karnams Regulation is a personal appointee and that there is no absolute right of hereditary succession to that office and that the principle of heredity does not apply to that office.

The Supreme Court held : ' It is no doubt true that the Madras Village Offices Act, 1895 does not apply to South Kanara District, but the hereditary principle has been applied to village offices in the South Kanara District in accordance with the instructions contained in the Madras Revenue Board's Standing Orders and the impugned Act has abolished the principle of heredity in making appointments to the village offices."

The correct position with regard to karnams (shanbhogs) in South Kanara District, will be evident from the proceedings of the Board of Revenue, Madras, dated 21st November, 1858.

It is not therefore correct to say that the principle of heredity does not apply to the appointments of shanbhogs in the District of South Kanara. The fact that the Board's Standing Orders have not been repealed in their application to the District of South Kanara, which is now part of the State of Mysore, will not make any difference since the Boards' Standing Orders recognise the principle of heredity underlying the Madras Hereditary Village Offices Act. The Schedule to the impugned Act specifically repealed the Madras Hereditary Village Offices Act and the Madras Karnams Regulation.

M. Rama Jois, Ganpat Rai and S. S. Khanduja of M/s. Ganpat Rai & Co., Advocates, for Appellants (In C.As. Nos. 174, 177, 181, 183, 186, 191 and 194 of 1965).

R. B. Datar, Advocate, for Appellants (In C.A. No. 190 of 1965).

C. K. Daphtary, Attorney-General of India (B. R. L. Iyengar and B. R. G. K. Achar, Advocates, with him); for Respondents (In all the Appeals).

G.R.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, N. RAJAGOPALA AYYANGAR AND R. S. BACHAWAT, JJ.

A. Venkata Subbarao and others

Appellants

v.

The State of Andhra Pradesh, etc.

Respondents.

Essential Supplies (Temporary Powers) Act (XXIV of 1946)—Regulation and control of trade in foodgrains under—Government appointing procuring agents to procure and sell paddy and rice at fixed prices—Government raising subsequently the procuring and selling price—Difference in new and old selling prices on stocks lying with procuring agents on the day previous to rise in prices—Claim to by Government on the ground that procuring agents were its agents—Tenability—Suit for refund of such amounts paid to Government—If governed by Article 62 or 120 of Limitation Act (IX of 1908).

Limitation Act (IX of 1908), Articles 62 and 120—Scope and applicability of Article 62—Suit for refund of tax illegally collected—If governed by Article 62 or 120.

During 1947-48 there was rice scarcity in certain districts in Madras. The Government took action under the Essential Supplies (Temporary Powers) Act (XXIV of 1946) and passed various orders for the procurement and distribution of rice. Rice thereafter could be procured only by the Government or by the procuring agents appointed by it and disposed of according to the orders of the Government. Under these orders licensed wholesalers and retailers were also appointed. The appellants were procuring agents and wholesalers under this system. They entered into various agreements with the Government for this purpose. Their duty was to procure rice from specified areas at prices specified by the Government from time to time and to deliver it at prices so specified, to the Government or to persons nominated by it or to other licensed purchasers. The procurement price was in each case lower than the selling price and the procuring agents were under the contract entitled to the difference between the two prices. While the appellants were thus carrying on their business three successive orders were made by the Government enhancing in each case the prices at which the appellants could buy and sell their rice. On the dates on which each of these orders came into force each appellant had lying with him in stock certain quantity of rice. This had been procured by the agents earlier and therefore at the then prevailing lower purchase price. The appellants had to sell this rice at the new increased price and hence became automatically entitled to a larger sum than they were before the increase. The enhancement of the procuring agents' profit was entirely due to the Government action in increasing the prices and the Government insisted that the excess sums should be paid to it. The appellants paid these sums under protest and filed suits for the recovery of the sums so paid. Various methods had been employed by the Government for realising these excess amounts which were described as surcharges. Thus in some cases the procuring agents were threatened with cancellation of their licences. In others these surcharges were deducted from moneys payable by the Government to them for rice supplied by them. The third method was to requisition the stock of rice lying with the procuring agents on the day immediately preceding the coming into force of the increased price at the rate then obtaining and thereafter releasing such rice only upon the procuring agents paying the surcharge or on their executing an agreement to pay the same.

On these facts the question arose whether the Government was entitled to claim the surcharge. The Government contended that the appellants were its agents or in the alternative stood in a fiduciary relationship to it and as such were liable to account for the profit made by them due to increase in prices by the Government. On the other hand the appellants contended that the surcharges were in essence taxes which had been illegally imposed on them and that their suits for the refund of the same were governed by Article 120 and not by Article 62 of the Limitation Act (IX of 1908).

Held, on facts by majority (*Rajagopala Ayyangar and Bachawat, JJ.*): (1) no relationship of principal and agent or of a fiduciary character had ever come into existence between the appellants and the

* Civil Appeals Nos 101, 131, 168 to 171, 259 to 260, 302 to 303, 306 to 309, 310, 644 and 837 to 857 of 1962 and 325, 437 to 441 and 996 of 1963.

14th December, 1964.

Government. If the theory that the appellants were the agents of the Government be discarded as untenable there would be no legal basis at all for the surcharge. It would be a tax imposed by the executive fiat without any legislative sanction on the capital value of the stocks of foodgrains held on a particular date. Hence the Government was not entitled to claim the surcharges; and

(ii) the suits for refund of the surcharges illegally collected by the Government were governed by Article 62 and not by Article 120 of the Limitation Act (IX of 1908) and should be decreed in those cases where the suits were filed within the time specified in Article 62.

The words of Article 62 of the Limitation Act (IX of 1908) were derived and adopted from the terminology employed in the English action for money had and received. Therefore Article 62 applies wherever the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which in law render the receipt of it, a receipt by the defendant to the use of the plaintiff. In other words, it is not necessary in order to attract Article 62 that at the moment of the receipt the defendant should have actually intended to receive it for the use of the plaintiff; it is sufficient if the receipt was in such circumstances that the law would impute to him an obligation to retain it for the use of the plaintiff and refund to him when demanded. A suit for refund of tax illegally collected would therefore be governed by Article 62 and not by Article 120.

Mahomed Wahib v. Mahomed Ameer, I.L.R. 32 Cal. 527 and *Rajputana Malwa Railway Co-operative Stores, Ltd v. The Amere Municipal Board*, I.L.R. 32 All. 491, Approved. *Anantram Bhattacharjee v. Hem Chandra Kar*, I.L.R. 50 Cal. 475 and *Lingangouda v. Lingangouda*, I.L.R. (1953) Bom. 214, Disapproved.

Article 62 would be inapplicable in certain circumstances. Where the defendant occupies a fiduciary relationship towards the plaintiff it is clear that Article 62 is inapplicable. Next even if the claim could have been comprehended under the omnibus caption of the English action for money had and received still if there are other more specific articles in the Limitation Act, e.g., Article 90 (mistake), Article 97 (consideration which fails), Article 62 (would be inapplicable). Lastly, if the right to refund does not arise immediately on receipt by the defendant but arises by reason of facts transpiring subsequently Article 62 cannot apply for it proceeds on the basis that the plaintiff has a cause of action at the very moment of the receipt.

If the terms of a specific Article do apply to a specific case it could not be ignored and a general Article sought merely on the ground that the latter affords a longer period of limitation for the filing of a suit.

Per Sarkar, J. : Where as a result of the requisition and release of the stocks the Government had obtained moneys from the appellants, the realisation had been legal and did not amount to unauthorised levy of tax and the appellants were not entitled to recover them from the Government. For the same reason where in respect of such requisition and release the appellants had not paid money directly, but had entered into engagements to pay moneys, those engagements would be legal and enforceable.

(Sarkar, J. however agreed with the majority on the other questions.)

Appeals from the Judgments and Decrees dated 8th March, 1958, 18th February, 1959, 15th July, 1958, 22nd February, 1960, 22nd August, 1958, 25th August, 1958 and 1st July, 1959 of the Andhra Pradesh High Court in Appeal Suits Nos. 33 and 62 of 1953, 672 to 675 of 1954, 29 and 30 of 1953, 956 of 1953, 551 of 1954, 201, 45, 822, 823 and 54 of 1953, 470 of 1955, 368, 34, 821, 766, 650, 764, 769, 631, 646, 647, 648, 649, 765 and 892 of 1953, 352, 353, 354 and 346 of 1954, 644, 700 and 701 of 1953 and 321 of 1954, respectively.

K. R. Chaudhuri, Advocate, for Appellants (In C.A. Nos. 101, 168, 169, 171 and 310 of 1962 and 438 of 1963).

A. V. Viswanatha Sastri, Senior Advocate (*A. Vedavalli* and *A. V. Rangam*, Advocates, with him), for Appellants (In C.A. Nos. 131 and 170 of 1962).

T. V. R. Tatachari, Advocate, for Appellants (In C.A. Nos. 259 to 260 of 1962, 325, 437, 439, 440, 441 and 996 of 1963).

R. Gopalakrishnan, Advocate, for Appellants (In C.A. Nos. 302 and 303 of 1962).

A. V. Viswanatha Sastri, Senior Advocate (*T. V. R. Tatachari*, Advocate, with him), for Appellants (In C.A. Nos. 306 to 309 of 1962).

Lakshmi Devi and *T. Satyanarayana*, Advocates, for Appellants (In C.A. No. 644 of 1962).

A. V. Viswanatha Sastri, Senior Advocate (*N. R. Rao* and *B. Parthasarthy*, Advocates, and *J. B. Dadachanji & Co.*, Advocates, with him), for Appellants (In C.A. Nos. 837 to 857 of 1962).

C. B. Agarwala, Senior Advocate (*R. Ganapathy Iyer* and *B. R. G. K. Achar*, Advocates, with him), for Respondents (In C.A. Nos. 306 to 309 and 837 to 857 of 1962).

R. Ganapathy Iyer, *Togeshwar Prasad* and *B. R. G. K. Achar*, Advocates, for Respondents (In C.A. Nos. 101, 131, 168 to 171, 259-260, 302 and 303, 310, and 644 of 1962 and 325, 437 to 441 and 996 of 1963).

The Court delivered the following judgments :

Sarkar, J.—These appeals arise out of suits filed for recovery of money from the Government. The appellants were the plaintiffs and the respondent in each appeal is a State, the defendant in the suits.

In the years 1947 and 1948 there was rice scarcity in certain districts in Madras as it was then constituted. These districts are now in Andhra Pradesh. The Government of Madras took action under the Essential Supplies (Temporary Powers) Act, 1946 and passed various orders for the procurement and distribution of rice. Rice thereafter could be procured only by the Government or by the procuring agents appointed by it and disposed of according to the orders of the Government. Under these orders licensed wholesalers and retailers were also appointed. The appellants were procuring agents and wholesalers under this system. They entered into various agreements with the Government for the purpose. Their duty was to procure rice from specified areas at prices specified by the Government from time to time and to deliver it at prices so specified, to the Government or to persons nominated by it or to other licensed purchasers. The procurement price was in each case lower than the selling price and the procuring agents were under the contract entitled to the difference between the two prices.

During the period with which we are concerned, three successive orders were made by the Government specifying the prices and in each case there was an increase. The first increase in prices took effect on 27th July, 1947, the second on or about 6th December, 1947 and the third on 21st November, 1948. On the dates on which each of these orders came into force, each appellant had lying with him in stock certain quantity of rice. This had been procured by the agents earlier and therefore at the then prevailing lower purchase price. The appellants had to sell this rice at the new increased price and hence became automatically entitled to a larger sum than they were before the increase. The enhancement of the procuring agents' profit was entirely due to the Government action in increasing the prices and the Government thought that they were not entitled to it and insisted that the excess sums should be paid to it by them. The appellants paid these moneys to the Government under protest and it is for the recovery of the moneys so paid that, broadly speaking, the suits were filed.

Now various methods had been employed by the Government for realising these excess amounts which have been described in these proceedings as "surcharges". Thus in some cases the procuring agents or wholesalers refusing to pay were threatened with cancellation of their licences and to avoid this they made the payments. In other cases, these surcharges were deducted from moneys payable by the Government to them for rice supplied by them. The third method which concerned the increase made in November, 1948 was to requisition the stock of rice lying with the procuring agents on the day immediately preceding the coming into force of

the increased price at the rate then obtaining and thereafter releasing such rice to the procuring agents only upon their paying the surcharge or on their executing an agreement to pay the same.

It is clear that if the Government was not entitled to the amount of the surcharge, it could not retain the moneys paid by the appellants to it on that account. The principal question is : Was the Government entitled to those moneys? In regard to the moneys collected except by the method of requisition and release, the Government's contention was that the appellants were its agents and that being so, any excess amount which was coming to them as a result of the orders was profit made by them in connection with the business of the agency for which they were liable to account to the Government. It was also said that if the appellants were not the Government's agents strictly speaking, they at least stood in a fiduciary relationship to it which made them liable to account for the extra profit. My learned brother Ayyangar has dealt with this question and there is nothing that I have to add to that. I am in full agreement with his view that no relationship of principal and agent or of a fiduciary character had ever come into existence between the appellants and the Government. I wish, however, to observe that I do not see how, even if the appellants were the Government's agents, Government was entitled to the extra profit. Admittedly under the contract between a procuring agent and the Government, even if that contract was of agency, the procuring agent was to procure and sell rice at the prices fixed and prevailing at the time respectively of the procurement and sale. It is not disputed that the difference belonged to him. It was in fact said that it was the commission to which he was entitled under the contract as an agent. If this is so, the procuring agent would under the contract be entitled to keep the larger difference caused by the selling price having been increased after his procurement. Hence it seems to me that under the contract, irrespective of whatever kind it was, the difference, even though it became larger, belonged to the procuring agent and the Government had no right to it.

Another question that arises in these appeals in regard to the moneys collected by the methods other than requisition and releases is whether the claims of the appellants for the refund were not barred. I agree with my brother Ayyangar that Article 62 of the Limitation Act governed the case and the claims were not barred if the suits in respect of them were filed within the time there specified. With regard to the meaning of the words "Money received by the defendant, for the plaintiff's use" in that article, I think, as Ayyangar J., pointed out the correct view was taken, in *Mahomed Wahib v. Mahomed Ameer*¹. The suits in which the claims arose in circumstances other than those described hereafter the question of limitation has to be decided under Article 62 only. I do not feel called upon on the present occasion to decide to what other cases, if any, Article 62 might apply.

It remains to deal with the amounts realised by the method of requisitioning the rice in stock and releasing it. It was contended on behalf of the appellants that this was really taxation by executive fiat and was therefore an illegal levy of tax. I am unable to accept this contention. Support for it was sought by the appellants from *Attorney-General v. Wills United Dairies*². It does not seem to me that that case furnishes any basis for the contention. There the Ministry of Food Production had granted a licence to a trader to buy milk on payment of a certain charge and it was held that the charge could not be levied except on the authority given by statute and that no such authority had been given. Another case to be considered in this connection is *Attorney-General v. Homebush Flour Mills, Limited*³. There it was held that a certain statute which had been passed by the Parliament of New South Wales, though purporting to require payment upon the exercise of an option by a trader in fact left him no choice and compelled him to make the payment and therefore in reality imposed an excise duty which only the Commonwealth Parliament could impose and for this reason the statute was *ultra vires* the Legislature. The

1. (1905) 1 L.R. 32 Cal. 527. 1 Cal L.J. 167.

3 56 C.L.R. 390.

2. (1922) 127 L.T. 822. 91 L.J.K.B. 897.

last case on this point which I have to notice is *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited*¹. There the Provincial Legislature of British Columbia had passed an Act which authorised a committee constituted under it to impose a certain levy and it was held that the levy was a tax which the Legislature had no power to impose.

The Australian case and the Canadian case were cases of levy under *ultra vires* statutes and the English case was of a charge made without any statutory backing at all. It seems to me that the present case is not of any of these kinds. There is here no challenge to the legality of the Essential Supplies (Temporary Powers) Act under which the requisition and release had been made. Nor was it contended that under the Act the Government could not requisition the stock of rice in the possession of a procuring agent at the price previously prevailing, nor that having done so, it could not sell the rice so requisitioned at the price subsequently fixed. If it could so sell the rice requisitioned to an outsider, it could equally sell it back to the procuring agent from whom it was taken. This is precisely what was done in this case. The Government's acts were perfectly within its statutory powers and legal. It is not a case where the appellants had been compelled to obtain the release on payment to avoid going out of trade as was held in the Australian case to have happened. The appellants were free not to pay and to obtain or not to obtain the release. If they had not, it has not been said that their trade would have stopped. The *ratio decidendi* of the Australian case that the trader had been compelled to pay, which was why the payment was held to have amounted to a tax, does not apply to the case in hand.

There is not the slightest doubt that the extra profit with which we are concerned had not come to the procuring agents by reason of any merit of their own; it had come into existence only because the exigencies of the circumstances prevailing had compelled the Government to increase the price. The Government had apparently felt doubtful if its earlier methods of realising the extra profits were legal and to avoid the consequences of any illegality, it followed this procedure and to the legality of it I find no objection. If the procedure was legal, as I think it was, it could not have resulted in an illegal levy. I would, therefore, hold that where as a result of the requisition and release the Government had obtained moneys from the appellants, the realisation had been legal and did not amount to unauthorised levy of tax and the appellants are not entitled to recover them from the Government. For the same reason where in respect of such requisition and release the appellants had not paid money directly, but had entered into engagements to pay moneys, those engagements would be legal and enforceable. The question of payments and of agreements of this particular kind are involved in Appeals Nos. 840, 842, 845, 850, 853 and 855 of 1962. I would dismiss those appeals so far as they concerned claim for the recovery of moneys realised by the Government by requisition and release and the enforceability of the agreements in respect of them. The other appeals except where the suits were barred as stated by Ayyangar, J., should be allowed.

Rajagopala Ayyangar, J. (for himself and *Bachawat, J.*).—This batch of 44 appeals have been heard together because most of the points of law raised in them are common. They are before us by virtue of certificates of fitness granted for each appeal by the High Court of Andhra Pradesh.

The facts leading to the suits out of which these appeals arise are briefly these: The appellants are owners or lessees of rice mills in the districts of West Godavari, East Godavari and Krishna. Their business consisted in purchasing paddy from producers, milling their purchase in their mills and in selling the rice so milled to wholesale dealers in rice and others. While so, in or about 1946-47 and even before, severe restrictions were imposed in the State of Madras on the trade in foodgrains in order to maintain their supplies and ensure their proper and equi-

table distribution to the community. Action in that behalf was taken in respect of two matters : (1) Procurement of paddy and rice, and (2) Dealing in them. For this purpose the power vested in the State Government under the Essential Supplies (Temporary Powers) Act, 1946 was utilised and two Orders "The Foodgrains Procurement Order, 1946" (later modified by the Foodgrains Intensive Procurement Order, 1947) and the Foodgrains Licensing Order, 1946 were issued. Under the former the procurement or purchase of foodgrains including paddy was placed under control and the right to purchase was restricted to the Government and to the procurement agents appointed and notified by them. The appellants were among those who were appointed as "Procuring agents" under that Order. The sales to be effected by the procuring agents of the milled rice were also placed under control by virtue of the Licensing Order which prohibited all trade or dealing in foodgrains including rice except by those who held licences and subject only to the terms and conditions of the licence. The appellants were each one of them licensed to deal in rice under this Licensing Order. It might be mentioned that the prices at which paddy could be procured as well as the price at which paddy and rice could be sold by the licensed dealers were also fixed by orders, and notifications issued under the Essential Supplies Act. While the appellants were thus carrying on their business subject to the provisions of the two "Orders" we have mentioned earlier, the prices at which the appellants could sell rice which they milled out of the paddy procured by them were enhanced on three occasions—July, 1947, December, 1947 and November, 1948 and, on each occasion, they were directed to submit statements regarding the stocks of paddy and rice held by them on the day just previous to that on which the increased prices were to come into effect and they were directed to pay as a "surcharge" the amount representing that increase on the stocks held by them. The appellants demurred, but payment was insisted on and the same was either paid under protest or recovered from them in several modes to which we shall refer in detail later. The suits out of which these appeals arise were brought by these miller-procuring agents for recovery of the amounts of one or more of the three surcharges that were collected from them, on the ground that the "surcharges" were virtually taxes which had been illegally imposed and levied on them. These suits were filed in Courts of different Subordinate Judges having territorial jurisdiction over their places of business. Some of these suits were decreed while others were dismissed. Appeals were filed to the High Court of Andhra Pradesh by the aggrieved parties and most of these appeals were heard together by the High Court and a common judgment was delivered directing the dismissal of all the suits. A few of them came on for hearing subsequently, but the learned Judges following the judgment of the Court in the main batch disposed of them in accordance with that decision. On applications made by the several plaintiffs certificates of fitness were granted by the High Court and that is how the appeals are now before us.

As would be seen from the foregoing, the main point in controversy in these appeals is the legality of the collection by the Government of amounts which are termed "surcharges" in these proceedings from these several plaintiffs who are the appellants before us. In order to appreciate how the surcharge came to be imposed and the circumstances attending their collections as also the defences raised to the suits, it is necessary briefly to advert to the statutory provisions which furnish the background in which this levy came to be made and collected.

As is well known, at the end of the Second World War the country was faced with a scarcity of foodgrains with the result that statutory rationing had to be resorted to in most urban areas ; and for the purpose of enforcing rationing stocks of paddy and rice had to be made available. Power in this behalf was originally exercised under the Defence of India Act and the Rules framed thereunder and by subordinate legislation undertaken by virtue of powers conferred by the Defence of India Rules. When the Defence of India Act ceased to be in force on the expiry of six months after the termination of the war and as this scarcity still continued the Essential Supplies (Temporary Powers) Act, 1946, repealing and replacing the Essential Supplies (Temporary Powers) Ordinance, 1946 (XVIII of 1946) was enacted to

be in force originally for 5 years till 1st April, 1951 to deal with the problem of maintaining supplies essential to the community. Under section 3 of this statute

"The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, may by order provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein".

Without prejudice to the generality of the powers conferred by sub-section (1), sub-section (2) empowered Government by order to provide *inter alia* for :

"(c) for controlling the prices at which any essential commodity may be bought or sold ;

(d) for regulating by licences, permits, or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity ;

(e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale ;

(f) for requiring any person holding stock of an essential commodity to sell the whole or a specified part of the stock at such prices and to such persons or class of persons or in such circumstances, as may be specified in the order ;

(i) for requiring persons engaged in production, supply or distribution of, or trade or commerce in any essential commodity to maintain and produce for inspection such books, accounts and records relating to their business and to furnish such information relating thereto, as may be specified in the order ;".

Under the powers thus conferred a scheme was devised for (a) the procurement of foodgrains (we are here concerned with paddy and rice) from producers, (b) for their sale to wholesalers, (c) a further sale to retailers and (d) ultimately the sale to the consumers, the last of which was, as stated already, based on a system of rationing to secure equitable distribution. The appeal is concerned with the machinery and procedure employed for the procurement of foodgrains in the districts of East Godavari, West Godavari and Krishna which were reckoned as surplus districts. Though legislation of that or a similar type was also applicable to certain other areas these appeals are only concerned with the events that happened in these three districts. The plaintiffs who filed the several suits which have been directed to be dismissed by the High Court and who are the appellants before us were owners of rice mills or lessees or licensees of such mills in these three districts. They were appointed as procurement agents for buying up paddy from the producers, *i.e.*, cultivators or landholders. They were also licensed under several Control Orders to which reference will be made later, to deal in the paddy which they procured or the rice into which they converted the paddy in their mills. The prices at which they could procure the paddy from the producers was fixed by executive order issued under the powers contained in section 3 (2) (c) of the Essential Supplies (Temporary Powers) Act. Similarly, the price at which they could sell to wholesalers was likewise fixed.

While things were going on in this state with the prices fixed operating to determine the purchase and the sale price of these procuring agents, Government raised the purchase and sale price of paddy and rice in or about July, 1947. They then directed these procuring agents to pay over to them as a "surcharge" the difference between the original and the enhanced price on the stock of paddy held by them on the day previous to the rise in price. These miller-merchants resisted the levy but were forced to make the payment which they did under protest. There were similar rises in prices on 7th December, 1947 and on 21st November, 1948 and in a similar manner the amounts of these surcharges were collected from the several millers, the amount payable by each being calculated on the stock of paddy or rice remaining with them on 6th December, 1947 and 20th November, 1948 respectively.

A very large number of suits were filed by these merchants against the Government in the Courts of Subordinate Judges of Eluru, Narasapur, Amalapuram, Kakinada, Rajahmundry and Masulipatnam for the repayments of these sums which they alleged had been illegally collected from them. The main defence of the Government was that the millers were really the agents of the Government and so

were accountable to them for the 'extra profit they would have made by reason of the increase in the price effected by Government. Besides, it was also asserted that the demand for the "surcharge" was authorised or permitted by the terms of the "procuring agreement" entered into with them as also by the conditions of the licences which were granted to them under which they were permitted to trade in paddy or rice. There was also a minor point raised that the suits were barred by section 16 of the Essential Supplies Act, 1946. As stated earlier, suits filed in some of the Courts were dismissed accepting the defence raised by the Government while those filed in other Courts succeeded and decrees were passed for the repayment of the several sums collected by the Government. Appeals were filed to the High Court from these decrees and then those filed by the Government were allowed while those by the miller-plaintiffs were directed to be dismissed by a common judgment from which most of the appeals before us arise. We should, however, mention even at this stage that besides this common question there have been other defences raised to some of these suits to which it would be necessary to advert but we shall defer stating them until after we have finished with the points that are common to all these appeals.

We shall first take up for consideration the main point urged before us by Mr. Agarwalla for the respondent-State that the appellant-millers were "agents" of the Government or, in any event, stood in a fiduciary capacity to the Government, so that the latter had a right to call on them to disgorge any profit they might make in their business of procuring and selling foodgrains over and beyond the remuneration permitted to them by the relevant agreements, licences, notifications, etc. For this purpose it is necessary to set out the various statutory provisions under which the appellants functioned as well as the terms and conditions of the agreements entered into by them with the Government. We shall also narrate in some detail the circumstances in which the "surcharge" were imposed and collected as they bear on the points urged before us in these appeals.

The first relevant statutory provision to which it is necessary to advert in this connection is the Madras Foodgrains Procurement Order, 1946 dated the 15th June, 1946 issued under Rule 81 (2) of the Defence of India Rules by the Government of Madras. It applied to several districts in the State, among them East Godavari, West Godavari and Krishna with which these appeals are concerned. Paragraph 1 of this Order required

"every person who whether as holder, occupier, tenant, sub-tenant or licensee or in any other capacity cultivates any land with paddy during Fash 1355 or Fash 1356 or who receives any portion of such paddy or rent or interest or repayment of loan in kind" "to sell the surplus of such paddy as determined by the District Collector to be available with such person after each harvest either as paddy or rice to the District Collector or an agent appointed by him and to no one else".

The District Collector and those authorised by him in that behalf were thus to have the monopoly of purchasing surplus paddy or rice from cultivators. The formula for the determination of the surplus was laid down in the same paragraph but to this it is unnecessary to refer. Under Paragraph 2 delivery of the paddy and rice had to be made to the Collector or his agent in the village in which that paddy or rice was cultivated or at some place within the District in which the cultivation took place, the price varying with the place of delivery, *i.e.*, taking into account the transport charges. The provision for the procurement by the Government or their authorised agents and at the prices fixed by the Collector on a monopoly basis was reinforced by Paragraph 3 of this Order which prohibited any person from selling or otherwise disposing of any quantity of paddy or rice to any person other than the District Collector or an agent notified in that behalf. We are omitting reference to the other paragraphs of this Order as unnecessary for our purposes. This Order was, among several others, continued in force by the Essential Supplies (Temporary Powers) Act, 1946 when the Defence of India Act lapsed and ceased to be in operation. Slight variations were made in this Order by subsequent notified Orders—*vide* for instance, the Intensive Procurement Order dated 26th March, 1947 but these changes or modifications related mostly to the

formula or basis for determining the surplus available for purchase, but as these made no material variation for our present purpose we are not setting them out.

Several millers in the three districts of East and West Godavari and Krishna whose business consisted in buying paddy, milling them and selling the rice, applied to the Government for appointment as procuring agents in accordance with this notification. Before however they could be appointed as procuring agents each of them had to execute an agreement in a form prescribed by Rules and as the terms of this agreement form the core of the case of the State Government on the question of agency it is necessary to refer to them in some detail. The heading of this model agreement which was signed by each one of the appellants reads :

“Agreement Executed by Procuring Agent/Authorised wholesale Distributor.”

It then proceeds :

“I.... having been appointed a dealer for the purchase, storage and distribution of paddy, rice or.....under the Intensive Procurement Scheme and or Informal Rationing Scheme, shall abide by all the provisions prescribed from time to time by or under the said schemes and any directions issued thereunder.

In particular—

I undertake to purchase paddy, rice... that are available for purchase in the area allotted to me at the rates prescribed from time to time by the Commissioner of Civil Supplies, Madras, or any officer authorised by him in this behalf.

I undertake to store paddy, rice or millets, purchased by me in proper godowns and to be responsible for their safe custody.

I also undertake to sell the stock of paddy, rice or millets with me to the persons to whom I am directed to sell it at such rates as may be prescribed from time to time. I agree to deposit with the District Supply Officer.....District Rs 2,000 against the fulfilment of this undertaking.

I agree to the forfeiture by the District Supply Officer.....District of this deposit for any breach by me or by any person acting on my behalf or failure on my part to comply with or to secure compliance with the aforesaid provisions, regulations and duties prescribed from time to time under the Intensive Procurement and/or Informal Rationing Scheme.”

On the execution of this agreement they were appointed as agents for purchasing paddy and rice determined as surplus with the ryots. This appointment was notified in the District Gazette and as against each group of agents the area in which they were authorised to procure was set out.

This was, however, not the only statutory provision regulating the conduct and dealings of the appellants. Under the Madras Foodgrains Control Order, 1947 issued under the Essential Supplies Act, 1946 which was in supersession of the Madras Foodgrains Control Order, 1945, promulgated under Rule 81 (2) of the Defence of India Rules though containing substantially the same terms, the business of dealing in foodgrains was subjected to statutory control. Clause 3 of this Order prohibited any person from engaging in any undertaking which involved the purchase, sale or storage for sale in wholesale quantities of any foodgrains “except and in accordance with a licence issued in that behalf by an officer authorised by the Government”. Purchase and sale of 10 maunds and more in one transaction was defined by the Order as being in wholesale and, similarly, storage of 15 maunds, and more was so treated. Each one of the appellants before us held licences to deal in foodgrains under this Order. Two of the clauses of the licence issued under this Order are of some relevance to the points arising in these appeals and have been referred to during the course of the arguments and it would be convenient to set them out at this stage :

“Clause 8.—The licensee shall give all facilities at all reasonable times to any authorised officer of Government, for the inspection of his stocks and accounts at any soap, godown or other place used by him for the storage or sale of any of the foodgrains mentioned in paragraph 1 and for the taking of samples of such foodgrains for examination.

Clause 9.—The licensee shall comply with any directions that may be given to him by the Government or by the officer issuing this licence in regard to the purchase, sale or storage for sale of any of the foodgrains mentioned in paragraph 1.....”

Of course, these licences were granted on applications made in statutory form by the several applicants and a paragraph in this application read :

"I have carefully read the conditions of licence given in Form A of the Second Schedule to the Foodgrains Control Order and I agree to abide by them."

It need hardly be pointed out that the prices at which purchases and sales by the procuring agents, wholesalers and retailers could take place were all determined by orders issued from time to time, under sections 3 (1) and 2 (c) of the Essential Supplies Act, and these dealers were enjoined strictly to adhere to them on pain of prosecutions and cancellation of their licences. The prices fixed varied from district to district and, of course, between several varieties of paddy and rice. In their fixation allowance was made for transport charges by adding the freight to the prime cost. It is not necessary to go into the details of these prices but it is sufficient to state that they were varied from time to time.

Pausing here, it is necessary to refer to the manner in which the miller-procuring agents disposed of the stock which they had procured from the producers. They could sell only to dealers who had licences to purchase from them, these buyers might be either wholesalers or retailers. It is in evidence that in some cases the procedure followed (particularly where the purchasers authorised to buy from the millers were outside their district) was that the purchasers were directed to pay the value of the grain which they were authorised to purchase into the Government Treasury. Intimation was thereafter given to the millers of the deposit and of the quantity which the purchaser was permitted to obtain. The specified quantity of grain would then be delivered to the authorised purchaser and the millers would then be paid by Government. This, however, was not the only method by which the miller-procuring agents could or did effect sales. They were, besides, permitted and authorised to sell to dealers of their choice provided such dealers were licensed dealers and so authorised to buy. Needless to add that the price which the millers could charge the dealers had to be the controlled price.

Procurement, however, was, as would be evident from what we have stated earlier, confined to particular areas of the Province which were surplus in that type of foodgrain. There were deficit districts which the Government had to supply with the requisite quantity of foodgrains. The foodgrains necessary for this purpose was obtained by the Government by purchases from the procuring agents. For this purpose agreements were entered into with the miller-procuring agent to which it is now necessary to refer. That agreement ran, to quote only the material terms :

"This agreement made the.....day of.....between his Excellency the Governor of Madras of the one part and ...(hereinafter called the supplier.....) of the other part.

Whereas the District Supply Officer.... has been authorised to buy paddy and rice on behalf of the Government of Madras.

Whereas the District Supply Officer has agreed to buy and the supplier has agreed to sell paddy/rice as detailed in the schedule below.

Now these presents witness and the parties hereto hereby mutually agree as follows :

1 The supplier shall deposit a sum of Rs(rupees.only) with the District Supply Officer. The deposit shall unless it is forfeited under the terms of this agreement be returned to the supplier upon the complete fulfilment of this agreement by the supplier.

2 This District Supply Officer will have the right to reject the whole or any portion of the paddy or rice supplied under this agreement on the ground that the paddy or rice supplied is different from or inferior to the sample tendered by the supplier and accepted by the District Supply Officer or that the packing is defective or that there is undue delay and default in supplying or on any other ground whatsoever. He will also have the right to accept the supply and to reduce the rate within six weeks from the date of despatch of the consignment, in case he considers either *suo motu* or otherwise the paddy or rice supplied to be inferior in quality to the sample tendered. The decision of the District Supply Officer regarding the quantity and quality shall be final and binding on the supplier.

3. In the event of the District Supply Officer rejecting the whole or any portion of paddy or rice, the supplier shall be bound to supply paddy or rice of the proper quality and quantity within such extended time, if any, as may be given to him by the District Supply Officer. If no time is given or if the time is given and the supplier fails to supply the balance or the whole of the paddy or rice within the time originally fixed or such extended time, the supplier shall be bound to pay such damages as may be fixed by the Commissioner of Civil Supplies, Madras (hereinafter called the Commissioner). The award of the Commissioner shall be final and binding on the supplier and shall not be open to question in any Court of law.

4. The District Supply Officer shall have the right to cancel the whole or any portion of this agreement at any time without assigning any reason whatsoever.

5. When paddy or rice is required to be delivered at any station/port the paddy or rice shall be considered to be at the risk of the supplier till it is loaded into railway wagons/steamer.

6. It is distinctly agreed by and between the parties that—

(1) The supplier will not hold the District Supply Officer responsible personally for any loss sustained by the supplier by reason of any act, deed or thing done by him touching this agreement ; and

(9) The supplier shall pay the general sales tax. ”

To this agreement was a Schedule and the quantity in tons of what was contracted to be purchased was set out in it as also the rate as well as the place and date fixed for delivery.

Paddy was thus being procured from the producers by the millers appointed so to procure under the Procurement Order we have set out earlier and they were disposing of the rice after milling the paddy procured to wholesalers and retailers at the prices fixed by the Government. Similarly those millers who had entered into contracts to supply rice to the District Supply Officer were duly fulfilling the terms of the contract and were being paid the prices stipulated in the agreements subject to any deductions that were made on account of inferior quality, deterioration of goods etc. While things were in this state, the Government of Madras promulgated, on the 17th of July, 1947, what is termed “ a bonus scheme ” for subsidizing cultivators to induce them to increase their production so as to have more surpluses for enabling procurement of larger quantities. The amount of the bonus was Re. 1 per maund of surplus paddy. Out of this one-half was to be passed on to the consumers by enhancing by eight annas a maund the wholesale and retail prices and the other half was to be paid to producers by the Government themselves. This increase in price was to take effect from 27th July, 1947. Instructions were issued to the Collectors and revenue officials to ascertain the quantity of rice and paddy lying with procuring agents as also wholesalers at the end of the day's transactions on 26th July, 1947 *i.e.*, the stock remaining unsold which had been obtained by them at prices prevailing before the enhancement of price which was to have effect from the next day and to require them to pay over to the Government as “ a surcharge ” the enhanced prices at which they were permitted to sell after that date, namely, eight annas per maund of paddy and twelve annas per maund of rice. Demands were made on some of the appellants for the payment of this surcharge. When they failed and neglected to pay surcharge demanded they were threatened with the cancellation of licences which they held under the Licensing Order and by reason of this threat, it is stated that, they made the payments demanded from them.

A similar and further increase in price was effected in the first week of December, 1947. The increase was Rs. 2 per maund of rice and Re. 1-6-0 per maund of paddy. The procuring agents, wholesalers and others who had stocks were, by the orders of Government issued on that occasion, directed to disclose the stock of paddy and rice with them as on the evening of 6th December, 1947 and in respect of the stock on that date, they were directed to pay to the Government “ the surcharge ” at the rates specified earlier. Demands were made on this basis on several of the appellants and when they refused to do so, two methods of recovery were adopted in order to enforce the demand. In the case of some of them where there were amounts owing by Government on account of rice supplied under the contract for supply referred to earlier or by reason of the Government having collected the amounts from purchasers who were authorised to lift stocks from the procuring agents, the Government deducted the “ surcharge ” from the amounts due by them and paid only the balance. This was one method. The other method was that which had been adopted for the realisation of the “ surcharge ” levied in July, 1947, namely, by threatening them with cancellation of their licences to deal in paddy and rice.

Before proceeding further and for the sake of completeness and to avoid having to revert to it later it would be convenient to mention here the ground upon which the surcharge was justified in the G.O. dated 6th December, 1947, by which it was imposed. In paragraph 8 after setting out the quantity of rice and paddy on which the surcharge would be levied and collected, the G.O. continued:

"Increased prices at the rate of Rs 2 per maund of rice will have to be collected as surcharge on the quantity available with the wholesalers and retailers on the evening of 6th December, 1947, as directed in Government Memo No."

The collection of this surcharge will be unearned profit to Government. The Government directed that this profit should be utilised to set-off the amount recoverable as surcharge."

Pausing here, it may be pointed out that it appears from the evidence that even with the adoption of these methods the Government were unable to realise the surcharges from every one of the procuring agents or other dealers wholesale and retail on whom these surcharges had been levied. We are mentioning this in order to indicate the change in the methods adopted for the recovery of the surcharge when it was imposed on the next occasion and this was on the 21st of November, 1948. By a G.O. of that date the Government directed the Collectors to levy on all stocks of paddy and rice with the procuring agents, wholesalers and retailers on the evening of 20th November, 1948, a further surcharge and recover the same from them. Some of the appellants paid this amount under protest; in the case of others, the amount of the surcharge was deducted from the sums payable to them by Government for the supply by them of rice. In the case of certain others the Board of Revenue which had found that there were some merchants who had failed to pay the two earlier surcharges that had been imposed, suggested the adoption of a new method in order to realise the sum. This was that the Collectors should issue orders of requisition of paddy in the possession of these merchants in respect of the quantities which were ascertained as being with them on the 20th of November, 1948, and release the stocks by cancelling the requisition order only on their payment of the surcharges or on their executing a writing agreeing to make the payment. We shall have occasion to refer to the special defence raised by Government in respect of this class of stockholders in the proper place.

With this narration we are now in a position to deal with the arguments addressed to us in these appeals. As would be seen from what we have stated earlier, the contention urged by the State of Andhra Pradesh was that the appellants were the agents of the Government and were, therefore, liable to account to them for the profits which they derived over and above the commission or remuneration which was fixed for them by the relevant notification of Government fixing the prices which might be charged. The learned Judges of the High Court were not prepared to accept this submission that the appellants were agents of the Government, but they nevertheless held that on a proper construction of the Intensive Procurement Order, 1947, read in conjunction with the terms of the Notification appointing the several plaintiffs as "procuring agents" coupled with the agreement which they executed to whose clauses we have already adverted, the plaintiffs were under a fiduciary obligation to Government which was akin to, though not exactly the same as an agency, by reason whereof they were bound to pay over to the Government the extra profits which they had made by the enhancement of the prices effected by the Government on the three occasions. The contention raised on behalf of the plaintiffs that the "surcharge" was in reality a tax which was illegally levied by executive order was rejected by them.

As the principal point in controversy between the parties related to the precise legal relationship between the procuring agents and the Government, we shall take that up first. Before considering the arguments addressed to us by Mr. Agarwala it would be convenient to set out certain facts relevant to this matter which are not in dispute. It is common ground that the procuring agents had to buy and bought the grain from the producers with their own money. The grain purchased was transported to the godowns at their cost and stored by them at their own risk, the godown rent being paid by them. In other words, there was no dispute that the

property in the goods purchased by the procuring agents vested in them. If there was any depreciation in the quality or if there was any short-fall owing to driage, action of rodents, insects, moisture, theft, etc., the loss would be theirs. In order to raise the necessary funds and to finance themselves for the purchase the procuring agents pledged their goods including the foodgrains purchased by them and obtained loans from banks and other financing institutions. They could effect a sale of the grain with them subject, however, to two conditions : (1) the purchaser must be one authorised to buy, (2) the price should not exceed that fixed under the notifications and orders issued from time to time, i.e., sales at free market rate were not permitted. *Prima facie*, therefore, it would appear that the procuring agents were merely conducting their business in the purchase of paddy and the sale of rice, on their own account, subject however to the regulation and restrictions imposed by the statutory orders, and the licences issued thereunder which enabled Government to effectively control in the acquisition and distribution of foodgrains through the usual trade channels to the ultimate consumer in an orderly and equitable manner. Learned Counsel for the State, however, urged that the true legal relationship had to be determined on other considerations. First, there was the obligation cast by Para. 1 of the Foodgrains Procurement Order on producers of foodgrains to sell the surplus of their paddy as determined by the authorities to the District Collector or "*an agent appointed and notified by him in this behalf*" and to *no one else*. In the subsequent paragraphs of the same Order, the persons to whom the foodgrains were to be delivered were referred to as "*the agents of the Collector*" authorised or appointed by him in that behalf. Next was the description of these procuring agents in the notification regarding their appointment. There also the same terminology of referring to them "as agents" for procurement was employed. Thirdly, in the agreements executed by the "procuring agents" reliance was placed on the following clauses specifying the obligations undertaken by them :

(1) They undertook to purchase paddy that were available for purchase in the areas allotted to them.

(2) They undertook to store the paddy or rice purchased in proper godowns and made themselves responsible for the safe custody of the grain.

(3) They undertook to sell the stocks of paddy or rice with them to persons to whom they were directed to sell at such prices as might be prescribed.

It was urged that their description as "agents" which *prima facie* had to be taken as having meaning as indicative of their real position, was established as a fact by the duties which they were called on to perform and which they undertook to perform under their agreement. In particular it was stressed they were constituted the "agents" of Government to buy up the surplus paddy made available for them, to store the grain purchased on behalf of the Government in secure godowns, and to sell the goods purchased on behalf of Government and also stored on behalf of Government to such persons who might be nominated in that behalf and at prices fixed by Government. It was, therefore, submitted that they were "agents" who would on the one hand be entitled to indemnity from the Government for any loss that they might sustain in their engaging in the business of the agency of purchase and storage and sale on behalf of Government and, on the other, were bound to make over to the Government such profit that they may obtain out of the business of the agency. It was the further case of the Government that the difference between the procurement price and the price which was fixed for sale by them constituted the commission or remuneration which would belong to the agents. In further support of these submissions learned Counsel referred us to the fact that in the Notification appointing some of the plaintiffs as procuring agents, published in the Krishna District Gazette they were referred to as "*village procuring agents for paddy or rice on behalf of Government*" in their respective villages. Our attention was also drawn to a communication by the Collector of Kakinada dated 26th April, 1947, in which he referred to the purchases of paddy by the procuring agents as having been made "*on Government account*." It may be pointed out that the order last referred to was to direct these "agents" not to engage in private trade

apparently in connection with the sale of the paddy procured. This last document might be ignored as it emanated from the Collector and, as is clear from the context in which it occurred, that it was meant as a warning to the procuring agents not to sell the procured paddy or rice except to those authorised to purchase them.

The point that has now to be considered is whether the description of the plaintiffs as "procuring agents" and the undertaking by them in the agreements which they executed to purchase the paddy offered, to store them in proper godowns and to sell them at prescribed prices to persons who had obtained requisite permission to purchase rice or paddy, would make them agents of the Government so as to (a) render Government liable to indemnify them for any losses which they might sustain in the business, and (2) conversely in a situation of immediate relevance, enable the Government to claim any profit made by them over and above the "remuneration" permitted to them.

Before proceeding further, it is necessary to clarify two matters. First, though Mr. Agarwala referred to the margin between the procurement price and the price at which the procured paddy or rice could be sold as "remuneration," a contention which found favour with the High Court, we do not find it possible to accept the submission. There was a similar margin between the price at which a wholesaler could buy rice and that at which he could sell and similarly, in the case of the retail dealer, but it is hardly possible to call these as "remuneration." This margin or difference in the purchase and sale price was necessary in order to induce anyone to engage in this business and was of the essence of a control over procurement and distribution which utilised normal trade channels. It would, therefore, be a misnomer to call it "remuneration" or "commission" allowed to an agent and so really no argument can be built on it in favour of the relationship being that of principal and agent.

The second matter to which we would like to refer is that in the present case the direction "to account by the agent" adopting the theory contended for by the respondent, was given and enforced even before the agent made any profit *i.e.*, on the basis of an anticipated profit. We are drawing attention to this feature to emphasise the fact that the several orders of Government imposing the surcharge and enforcing the levy did not proceed on any theory that the procuring agents were "agents" who were called on to account for profits which they made in the business of the agency. It is only necessary to add that not merely procuring agents but wholesalers and retailers who could on no argument be called "agents" were directed to pay the surcharge.

We shall now proceed to deal with the arguments advanced to establish that the procuring agents were, in fact and in law, agents.

No doubt, the description in the Procurement Order and the agreement as "agent" is of some value, but is not decisive and one has to gather the real relationship by reference to the entire facts and circumstances. To start with, it is clear that as the purchases were made by the procuring agents out of their own funds, stored at their own cost, the risk of any deterioration, drilage or short-fall fell on them, they were the full owners of the paddy procured and they pledged the goods for raising funds. This aspect of their full ownership of the grain purchased is highlighted by the fact that they entered into agreements with the Government itself to sell the rice with them to District Supply Officers at the controlled market prices. Any contention that the procuring agents were not full owners of paddy or rice procured by them must manifestly fail as being inconsistent with the basis upon which this agreement by them to sell to Government was entered into. If further confirmation were needed it is provided by the fact that on the sales by procuring agents to Government under their supply agreement sales tax was payable which on the terms of the Madras General Sales Tax Act in force at the relevant time, would not have been payable if the paddy and rice were that of Government

and which they were holding merely as commission agents on behalf of the Government.

Next, it may be pointed out that these plaintiffs held licences under the Licensing Order under the Madras Foodgrains Control Order, 1947, in order that they might deal in the rice in their possession. In the licence which was granted to the plaintiffs which was in statutory form the foodgrains in their possession were referred to as *their stocks*. It may be pointed out that the form of the licence granted to procuring agents, wholesalers and retailers was the same.

Learned Counsel urged that even assuming that the property in the goods purchased passed to the procuring agents that would not by itself negative the relationship of principal and agent. For this purpose reliance was placed on Article 76 of Bowstead on Agency which runs :

“Where an agent, by contracting personally, renders himself personally liable for the price of goods bought on behalf of his principal, the property in the goods, as between the principal and agent vests in the agent, and does not pass to the principal until he pays for the goods, or the agent intends that it shall pass.”

He also referred us to certain decisions of the Madras and Punjab High Courts in which the principle laid down in this passage had been applied. We do not consider it necessary to examine this question in its fulness because we are satisfied that the procuring agent, when he bought the goods, was purchasing it for himself and not on behalf of the Government. The acceptance of the argument addressed on this aspect would mean that if the procurment agent so desired they might contract in the name of the principal, namely, the Government and thus establish privity between the Government and the purchaser and make the Government liable to pay for the price of the goods which he had purchased. This situation would, in our opinion, be unthinkable on the scheme of the Procurement Orders and generally of the Foodgrains Control Orders under which the procurement and distribution of foodgrains was placed under statutory control. What the Government desired and what was implemented by these several Orders was merely the regulation and control of the trade in foodgrains by rendering every activity connected with it subject to licensing and to the directions to be issued in pursuance thereof and not directly to engage in the trade in foodgrains.

The respondent can derive no advantage from the obligation on the part of the procuring agents to store the paddy or rice properly—a stipulation on which Mr. Agarwala laid considerable stress—and this for two reasons : (1) The purpose of the clause was to ensure that there was no loss of foodgrains which were then a scarce commodity. That this is so would be apparent from the terms of section 3 (2) (d) of the Essential Supplies Act which was effectuated by clause 9 of the licence granted under the Madras Foodgrains Control Order, 1947 which applied to all dealers in foodgrains, be they procuring agents (who also, as stated earlier had to obtain and obtained these licences), wholesalers or retailers. This clause reads :—

“9 The licensee shall comply with any directions that may be given to him by the Government or by the officer issuing this licence in regard to the purchase sale or storage for sale of any of the foodgrains mentioned in paragraph (1)”

The second reason is that the agreement executed by the procuring agents in which this clause as regards storage in proper godowns and undertaking responsibility for the safe-custody of the grain occurs, is one which was a form intended for execution not merely by procuring agents but also authorised wholesale distributors i.e., those who purchased their requirements from procuring agents ; admittedly the authorised wholesale dealers were not “agents” and the fact that this condition was insisted on even in their case is clear proof that it has no relevance to the question now under discussion. It therefore appears to us that the expression “agent” was used in the Intensive Procurement Order as well as in the agreements merely as a convenient expression to designate this class of dealers.

Before proceeding further it is necessary to advert to the decision of the High Court of Assam in *Bhowrital Mahesri and others v. State of Assam*¹, on which Mr.

Agarwala placed considerable reliance in support of this contention regarding agency. The Government of Assam had passed an *ad hoc* order directing certain foodgrain dealers to lift certain quantities of foodgrains from a Government Depot with a view to its being sold to persons nominated in that behalf by the Government. The dealers complied with this direction but when they tried to sell it to the persons nominated by the Government the latter refused to purchase or to accept the goods sold on the ground that the stuff was unfit for human consumption. At the time when the dealers took possession from Government godowns they had paid the price fixed by the Government and they filed a suit for the recovery of the price and the damage suffered by them on foot of indemnity claimable by an agent from a principal. The High Court of Assam upheld their claim and held that an agency had been constituted between the parties under which an obligation had been cast on the Government to make good the loss suffered by the dealer. We do not see how this decision assuming it is correct, on which we pronounce no opinion, bears any resemblance to the case on hand. There the dealers were required by Government to acquire from Government foodgrains which was Government property on the basis that they would be able to sell the same to purchasers designated. The terms of the contract were that they should pay the value in the first instance and recover it from the purchasers specified by Government. It was in such a situation that an agency was held to arise. The position in the case before us is totally different. By reason of the exercise of statutory power trade in foodgrains was controlled and placed under a licensing system. No persons could buy or sell rice or paddy exceeding specified limits of quantity unless he held a licence to do so. Dealers were classified into three classes, procuring agents, wholesalers and retailers. We are now concerned with procuring agents. Before the introduction of the licensing system, the millers as part of their business used to purchase paddy from growers, hull them in their mills and sell the rice obtained to wholesalers who in their turn sold to retailers from whom the consumers obtained their requirement. This method of trading and the same trade channels were utilised by the Government for the purpose of exercising control over the acquisition and distribution of foodgrains. In the first instance, the supplies available with producers for procurement was determined by Government so as not to leave with them more than what could reasonably be needed for their use. The producer was required to sell the quantity thus determined so as to make it available to the general public. The quantity having thus been determined the millers were brought under the Control Orders by requiring them to take out licences for purchase or sale of paddy and it is in the context of this method of utilising the trade channels for the purpose of procuring and distributing supplies of essential foodgrains that the legal relationship between the parties has to be viewed. As pointed out earlier, the agreement executed by procuring agents was in the same form and contained the same stipulations as that executed by "wholesale authorised distributors". These wholesale dealers thus undertook the same obligations as procuring agents to purchase, store and distribute paddy and rice in accordance with the licensing orders and the directions issuable under them. Obviously this could not turn the wholesalers into "agents". The argument that the procuring agents were agents because they were remunerated by the allowance of a commission in the shape of the margin or difference between the price fixed for procurement and for sale by them has already been dealt with and need not be repeated.

Mr. Agarwala next submitted that assuming that even if he were not right in these contentions that the plaintiffs were the agents of the Government still they were, under a fiduciary obligation to Government. Reference was, in this connection, made to section 88 of the Indian Trusts Act which reads .

"Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

The relevancy of this provision was explained by saying that even though the plaintiffs might be legal owners of the paddy and rice procured by them, the beneficial interest in these goods vested in Government and that thus the plaintiffs being persons bound in a fiduciary character to protect the interest of Government had obtained a pecuniary advantage by availing themselves of their position. We must plainly confess that we are unable to appreciate this argument. A fiduciary relationship would, no doubt, have arisen if the plaintiffs were agents, but if this were rejected we do not see on the basis of what relationship the fiduciary obligation can be rested. The purchase of paddy and rice by them was not as *benamidars* for Government, for their purchases were on their own account with their own monies though at prices fixed by the Government because of the Control Orders; they could sell their goods to others, only the buyers had to be licensed as also to the Government. The control exercised under statutory laws in respect of these matters cannot obviously render the trade of the plaintiffs one which they carried on for the benefit of the Government. If so, we fail to perceive the legal basis upon which the plaintiffs could be said to hold the stocks of grain with them for the benefit of Government. We have already pointed out that all risks of loss, deterioration, interest charges, godown rent, etc., were all their responsibility. In the circumstances, we consider there is no basis for the suggestion of a fiduciary obligation *de hors* a principal and agent relationship.

It was then said that assuming that the plaintiffs were not agents and that they were the full and absolute owners of paddy and rice with them and which they held on their own account and for their benefit, still the direction to pay the surcharges was a direction which the Government was authorised to issue under the terms of the licence granted to the plaintiffs to deal in the stocks procured by them. For this submission reliance was placed on clause (9) of the Licence under Foodgrains Licensing Order issued to them which ran:

“The licensee shall comply with any directions that may be given to him by the Government or by the officer issuing this licence in regard to purchase, sale or storage for sale of any of the foodgrains mentioned in paragraph (1).”

It was said that the direction to pay a surcharge was a direction in regard to the sale of the stocks. Further support was sought on a similar clause in the agreement executed by the procuring agents under which they agreed “to abide by all the provisions prescribed from time to time by or under the said scheme or any directions issued thereunder”. We do not see any substance in this argument. The direction to pay such amounts as might be demanded by Government is certainly not a direction contemplated or provided for by the scheme, namely, the Procurement Scheme nor is it a direction as regards the sale. Indeed, learned Counsel did not when this was pointed out, seriously press this submission for our acceptance.

Before proceeding further it would be convenient to ascertain the precise legal category into which the surcharge would fall. The dealers including the procurement agents were dealing on their own account in the matter of purchase and sale of paddy and rice. The price at which they could buy was fixed and the relevant Licensing Orders specified that they were to sell at the prices which were in force from time to time. While things were in this state, the price at which the procuring agents, wholesalers and others could sell was raised. Of course, in respect of the stocks purchased by them after that date they would have paid a higher price which would be compensated by the higher price at which they were permitted to sell, but we are concerned with the stocks-on-hand already purchased and remaining with them on 26th July, 1947, 6th December, 1947 and 20th November, 1948. Under the Foodgrains Control Order under which they were licensed to deal in foodgrains, they were entitled to sell the stocks with them at the prices fixed under the Price Control Order and prevailing on the date of the sale. They would, therefore, have, on an increase in the selling price, the benefit of the enhanced prices. It was this that was sought to be mopped up by Government by the three impugned orders by which the difference between the old and the new prices was directed to be collected as “surcharge”.

It was not suggested that the surcharges could be justified under any of the provisions contained in the Essential Supplies (Temporary Powers) Act. They were not imposed by notified orders promulgated under section 3 of that enactment and if they were, the question would have to be seriously considered whether such orders would be within the rule-making power under that Act. We have already pointed out that they could not be justified as authorised directions which were permitted to be issued either under the Procurement Order, the agreement executed in pursuance thereof or the Foodgrains Control Order and the licences issued thereunder. That was why the only serious argument that was raised was an attempt to justify them on the ground of the same being a liability to account on behalf of an agent and this contention we have already negatived as lacking substance. There was thus no legal basis upon which the surcharge could be justified and it would, therefore, follow that subject to any argument based upon the claim being barred by limitation, the claim to the refund of the same could not be resisted.

We shall be dealing with the claims arising in the individual appeals later; but at this stage it is sufficient to point out that as regards the claim for the refund of the surcharge collected on the stocks of paddy and rice in July, 1947, there was no defence to the claim except that the same was barred by limitation. We should, however, add that in all the suits a defence that they were barred by reason of section 16 of the Essential Supplies (Temporary Powers) Act, 1946 was raised, but the plea was wholly untenable and learned Counsel very properly did not seek to urge it before us. When demands for these sums were made they were either paid under protest, or when they were not so paid, the amounts were recovered by threats that the licences of the merchants should be cancelled.

As regards the surcharge levied in December on the stocks held by the plaintiffs on 6th December, 1947, we have already pointed out that two methods were employed for making this collection. They were: (1) by withholding the amounts due to them from Government for rice supplied; and (2) by threats of cancellation of licences. It would follow from what we have stated earlier that if the surcharge was not legal or justifiable, the claim for refund could not be resisted subject again to the question whether the claims therefor in the various suits were within the period of limitation. When we come to the third surcharge imposed in November, 1948, as already indicated, three methods were utilised for the purpose of making the collection: (1) Threat of cancellation of licences, (2) withholding the amount of the surcharge from the amounts payable by Government for rice supplied to them by the procuring agents, and (3) requisition from them of paddy or rice of a quantity equal to the stocks held by them on the evening of 20th November, 1948, and release of the same after they executed a writing agreeing to pay the amount of surcharge which agreements they honoured by making the payment demanded. Mr. Agarwala conceded that if the surcharges were illegal, such amounts as were paid on demand under protest, the amounts collected by withholding sums due from Government, as well as sums collected on threats of cancellation of licences would all be recoverable by the several plaintiffs. He, however, contended that in those cases where the foodgrains were requisitioned and released on the execution of agreements to pay the surcharges which were implemented the plaintiffs could not recover, and for two reasons: (1) That the Government had the power to requisition the stock and direct the traders to sell the foodgrains to Government and it might therefore be taken as if the requisition had been made on terms of paying for the stock the price payable on an earlier day, and (2) That by reason of the agreements which they executed, as a condition of the release of the stocks, they had bound themselves to make the payment, and their payment in accordance with their agreement was a voluntary payment which could not be recovered. This point based on the agreements arises only in Civil Appeals Nos. 840, 842, 845, 850, 853 and 855 of 1962.

To appreciate this argument it would be necessary to advert to the terms of the agreement. By way of sample we might refer to the one taken from the Manager of Kanyaka Parameshwari Rice Mill—appellant in Civil Appeal No. 840 of 1962. It reads:

"As regards the first quality paddy of 8,220 maunds, second quality of 1,545 maunds, rice first quality 886, second quality 254, which you have requisitioned in our mill this day i.e., to say 23rd November, 1948, I am hereby declaring myself liable to pay the amount of difference in prices fixed by the Government for the aforesaid items on the 21st November, 1948, and the prices prevailing previously. As you have released the goods on my liability I am in receipt of the same."

This was signed by the Manager of the Mills with an endorsement by the Taluk Supply Officer, "released for sale". These agreements were, as already indicated taken in pursuance of the directions by the Board of Revenue. It prescribed this method of obtaining agreements and the one to be pursued for recovering the surcharge imposed on this occasion. In their communication to the Collectors the Board of Revenue stated :

"The stock with all stock-holders (whether millers, wholesalers or retailers) on the evening of 20th November, 1948, should first be assessed with reference to the stock register. These stocks should be formally requisitioned at the old prices from 19th July, 1948 It is not necessary that the requisition notices should be issued on the 21st November, itself; those may be issued as early as possible after that date there being no delay at any stage, but only in respect of the quantity which was held in stock on the evening of 20th November, 1948. If the stockholders agree in writing to pay the difference in price due to the increase in price sanctioned by the Government the stocks should be released from requisition otherwise the stocks in question should be seized and sold to other merchants including quota-holders at the revised prices, the difference between the old and the new prices being credited to Government."

The argument that was addressed to the High Court was that whatever might be the position as regards those plaintiffs who had made the payments under protest or on account of the threats to cancel their licences or by deducting the amount due from the Government, merchants who voluntarily entered into agreements of the type we have just set out, stood on a different footing and that in their case they could not legally claim a refund of the amount thus paid in pursuance of these agreements. The High Court was apparently inclined to accept this submission. With great respect to the learned Judges we consider that there is no substance in this argument. If the theory that the plaintiffs were the agents of the Government be discarded as untenable, there would be no legal basis at all for the surcharge. It would then be in effect a tax imposed by an executive fiat without any legislative sanction on the capital value of the stocks of foodgrains held on a particular date. In this connection reference may be made to *Attorney-General (N.S.W.) v. Homebush Flour Mills, Ltd.*¹ where a scheme by which flour was expropriated by the State at a "declared" price and subsequently sold by the Crown at a "standard" price, the former owner being given the option of buying back flour at the latter price was held to constitute a tax.

Mr. Agarwala had to concede that if the surcharge was in substance a tax he could not successfully resist the claim of the plaintiffs to the recovery of the amount collected even in cases where the agreements were taken, for the agreements merely set out the nature of the surcharge and expressed the willingness of the executant to pay it. In this connection it has to be borne in mind that the Government was armed with coercive powers to enforce any demand which was legal and in the circumstances, it could hardly be contended that these payments were voluntary in the sense understood in this context.

In support of the submission that the surcharge was in essence a tax, learned Counsel for the appellants referred to the decision of the House of Lords in *Attorney-General v. Wilts United Dairies*.² The Food Controller was empowered by the Defence of the Realm Regulations to make orders regulating or giving directions with respect to "the production, manufacture, treatment, use, consumption, distribution, supply, sale or purchase or other dealing in any article as appears to him to be necessary or expedient" for the purpose of encouraging or maintaining the food supply of the country. It was found that there was disparity in the prices of milk prevailing in different areas and in order to equalise these prices the Food Controller purporting to exercise powers conferred on him by the Defence of the Realm Regulations, entered into agreements with the defendant-company by which

1. 56 C.L.R. 390. - - - - - 897

2 (1922) 127 Law Times 822 : 91 L.J.K.B

the latter were permitted to purchase milk within certain defined areas on terms that they should pay him a sum of two pence per gallon for this privilege. The defendant-company who was required to make this payment, refused to do so and to the information laid against it raised the contention that the charge amounted in effect to a tax levied in an unconstitutional manner. The company succeeded in the Court of Appeal and the Attorney-General brought the matter in appeal before the House. In dismissing the appeal, Lord Buckmaster after accepting the argument based upon the extreme difficulty of the situation in which the country found itself owing to the War, and the importance of securing and maintaining vital supplies essential for the life of the community, proceeded to consider the question whether a power to make such a levy was granted. The statute had confined the duties of the Food Controller to regulating the supply and consumption of food and taking the necessary steps for maintaining proper supplies.

It was observed :

"The powers so given are no doubt very extensive and very drastic, but they do not include the power of levying upon any man payment of money which the Food Controller must receive as part of a national fund and can only apply under proper sanction for national purposes. However, the character of this payment may be clothed, by asking your Lordships to consider the necessity for its imposition in the end it must remain a payment which certain classes of people were called upon to make for the purpose of exercising certain privileges and the result is that the money so raised can only be described as a tax the levying of which can never be imposed upon subjects of this country by anything except plain and direct statutory means."

Lord Wrenbury expressed the same idea in slightly different language when he said :

"The Crown in my opinion cannot here succeed except by maintaining the proposition that where statutory authority has been given to the executive to make regulations controlling acts to be done by His Majesty's subjects, or some of them, the Minister may, without express authority so to do, demand and receive money as the price of exercising his power of control in a particular way, such money to be applied to some public purpose to be determined by the Executive."

Pausing here, we might advert to two matters : (1) The last words of the learned Lord we have just quoted sufficiently answer an argument addressed to us based upon the use to which the amount of surcharge collected was to be expended, namely, as bonus to the producers. Secondly the fact that the company obtained licences from the Food Controller on the stipulation that they would pay him the two pence per gallon was not considered material for determining their obligation in law to make the payment.

While on this topic reference could usefully be made to the decision of the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited*.¹ The case was concerned with the legality of certain adjustment levies imposed on farmers by an Adjustment Committee created by an enactment of British Columbia by which the disparity in the production of fluid milk as compared with milk products was sought to be countered. It was contended on behalf of the State that the levies were not taxes but merely a scheme for pooling profits in a provincial trade. Lord Thankerton speaking for the Board said :

"The main issue of this appeal is whether the adjustment levies are taxes, In the opinion of their Lordships, the adjustment levies are taxes. They are compulsorily imposed by a statutory committee They are enforceable by law. Compulsion is an essential feature of taxation. The Committee is a public authority, and the imposition of these levies is for a public purpose. The fact that moneys so recovered or distributed as bonus among the traders in the manufactured products market does not affect the taxing character of the levies made."

Besides, if there is no legal basis for these demands by the Government we consider that it is not possible to characterise them as anything else than as taxes. They were imposed compulsorily by the Executive and are sought to be collected by the State by the exercise *inter alia* of coercive statutory powers, though these latter are vested in Government for very different purposes. We are clearly of opinion that the fact that agreements were taken from some of these merchants affords no defence to their claim for refund.

What remains for consideration is the defence based upon the claim being barred by limitation. The contention urged on behalf of the State is that the claim for a sum not legally due but illegally collected by Government which was the basis of these suits was governed by Article 62 of the Indian Limitation Act which provides a period of three years from the time when the money is received. That Article reads :

<i>"Description of suits.</i>	<i>Period of limitation.</i>	<i>Time from which period begins to run.</i>
62. For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years.	When the money is received."

If this Article were applied the portion of the claim in Civil Appeal No. 306 of 1962 relating to the refund of surcharge imposed in July, 1947 and the entirety of the claim in Civil Appeal No. 644 of 1962 would be barred.

The suit out of which Civil Appeal No. 306 of 1962 arises, namely, O.S. No. 2 of 1951 on the file of the Subordinate Judge, Rajahmundry made a claim for the refund of the surcharges collected from him in July, 1947, December, 1947 and November, 1948. The claim in regard to the surcharges of December, 1947 and November, 1948 were within the three-year period of limitation provided by Article 62, but the claim as regards what was collected in July, 1947 was beyond that period. The learned Subordinate Judge who negatived the defence based on the plaintiff being the agent of the Government decreed the suit in its entirety holding that it was not Article 62 that applied but Article 120 of the Indian Limitation Act which prescribes a period of six years. The learned Judges of the High Court having dismissed the suit on the merits had no occasion to consider the proper Article of Limitation that would govern the different claims contained in the suit.

The other appeal in which the question of limitation arises is Civil Appeal No. 644 of 1962. That arises out of Original Suit No. 18 of 1954 filed before the Subordinate Judge of Rajahmundry which claimed repayment of sums paid in July, 1947, December, 1947 and November, 1948. In the plaint the dates on which payments were made by him were stated as 29th November, 1947, 3rd June, 1948, 30th November, 1948 and 1st August, 1949. The suit was filed on 27th November, 1953 and unless therefore the period of limitation for the claims in the suit was the six-year period specified in Article 120 the entirety of the claims in the suit would be barred. The learned Subordinate Judge upheld the claim of the plaintiff to refund on the merits but dismissed it on the ground that it was barred by limitation. The plaintiff filed an appeal to the High Court but as his claim was rejected on the merits it become unnecessary to decide whether the suit was also barred by limitation. In view of our decision that the surcharges were not legally levied and that the Government was not authorised to collect them, the question whether the suit is barred by limitation necessarily arises for consideration.

It was submitted by the learned Counsel for the appellants that it was not Article 62 that applied to a suit making a claim of this nature but the residuary Article 120 which runs :

<i>"Description of suit.</i>	<i>Period of limitation.</i>	<i>Time from which period begins to run.</i>
120. Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years.	When the right to sue accrues."

As Article 120 can apply only if no other specific Article were applicable, we have to examine the question whether there is any other specific Article applicable and in particular whether the language of the first column of Article 62 covers a suit making a claim of the nature made in the plaint before us. The contention urged on behalf of the appellant in Civil Appeals Nos. 306 and 644 of 1962 was that the Article refers to "money payable by the defendant to the plaintiff" only in those cases where "the money was received by the defendant for the plaintiff's use". The latter condition

that the money which is sought to be recovered must have been received by the defendant for the plaintiff's use should, it was urged, be literally satisfied before that Article could be applied. In other words, the contention was that that Article could not apply unless at the moment when a defendant received the money, he received it specifically for the use of the plaintiff. On the other hand the rival construction suggested by the respondent was that the language of the Article had reference to the action "for money had and received" as known to the English Law, and that the reference to the receipt being for the plaintiff's use was a technical term of English pleading and law which imposed upon a defendant who received money in circumstances which in justice and equity belonged to the plaintiff rendered its receipt a "receipt by the defendant to the use of the plaintiff". Here, it was pointed out, the money was received by the defendant from the plaintiff which the plaintiff was not bound in law to pay but which he was compelled or forced to pay because of the threats or apprehension of legal process. The circumstances, therefore, in which the money was received were, it was said, such that notwithstanding that the receipt by the defendant purported to be for his own benefit still it was money which at the very moment of the receipt in justice and equity belonged to the plaintiff, and that was the whole basis of the plaintiff's claim on the merits.

The questions for consideration, therefore, are: (1) Does Article 62 embody the essential elements of the action known in English Law and pleading as the "action for money had and received to the plaintiff's use"? (2) Does the fact that at the moment of receipt the defendant intended to receive the money for his own benefit and not for the use of the plaintiff render the Article inapplicable? Stated in other terms is a literal compliance with the words that the money must have been received by the defendant for the plaintiff's use necessary before the Article applies, or is it sufficient that the circumstances of the case are such that the plaintiff being entitled in equity to the money, the law would impute to the defendant the intention to hold it for the plaintiff's use and compel a refund of it to the plaintiff.

There has been difference of opinion on the exact rationale on which that obligation was rested. One view was based on imputed promise or a quasi-contract which cast an obligation on the conscience of the party to restore benefits unjustly obtained. That quasi-contract was necessitated by the allegations, necessary in the ancient writ of *indebitatus assumpsit*. There has been some difference of opinion observable in the cases decided by the several High Courts as to the circumstances in which Article 62 could be invoked. The controversy has ranged on the point as to whether there ought to be a literal compliance with the last part of the first column of the Article before it could be applied. This in its turn, as we shall show presently, stems from a difference of opinion as to the rationale on which the action for money had and received rests in the English Law.

The doctrine on which the action for "money had and received" was based was propounded by Lord Mansfield in *Moses v. Macferlan*¹ where it was explained that it lay "for money which *ex aquo et bono* the defendant ought to refund" and in a later case² as "a liberal action, founded on large principles of equity, where the defendant cannot conscientiously hold the money". In later decisions it was said to be based not merely on an equitable doctrine but was a *Common Law right*³. The jural basis on which the action was originally supported, was a promise to pay by the defendant implied or imputed by law. Lord Mansfield explained:

"If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt and gives this action, founded on the equity of the plaintiff's case, as it were upon a contract."

*Moses v. Macferlan*¹ itself was an action of assumpsit and the imputed promise was an extension of the principle on which it was in its origin based as stated in Cheshire & Fifoot. In the third Edition of Bullen and Leake published in 1868 they said:*

"The action for money had and received is the most comprehensive of all the common counts. It is applicable wherever the defendant has received money, which, in justice and equity, belongs to

1. (1760) 2 Burr 1005. 1 Wm Bl. 219.

L R. (1913) A.C. 283.

2. *Sadler v. Evans*, (1766) 4 Burr. 1984.

* Cheshire & Fifoot Law of Contract, 5th Edn.

3. See for instance *Royal Bank of Canada v. Rel.*, p. 555-556.

the plaintiff under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff.

But, despite this formidable measure of unanimity, the abolition of the forms of action in the middle of the nineteenth century and the temptations of a new analytical jurisprudence gradually undermined Lord Mansfield's position. So long as the common lawyers thought in terms of procedure and associated quasi-contract with the writ of *Indebitatus Assumpsit*, they were content to accept the implications of unjust benefit. But when they abandoned their traditional forms and substituted a dichotomy of tort and contract, the old explanation seemed no longer to suffice. The various actions grouped under the insidious title of quasi-contract were clearly not tortious; if the new antithesis of the common law was inevitable, they must perforce be contractual. And, as they were equally clearly not based upon any genuine consent, they must rest upon an implied or hypothetical agreement."

Various bases have been suggested in modern times as the rationale and proper foundations on which to rest this action. But we are not concerned with these theories or their history and evolution in England. What is of relevance is the content and significance of the words "received by the defendant for the plaintiff's use". Article 62 in its present form was first enacted in the Limitation Act of 1871 as Article 60 and it has continued in the same terms since then with only a change in its number. We have, therefore, to see what exactly the draftsmen of this Article meant when it was first introduced in 1871. In *Mahomed Wahib v. Mahomed Ameer*¹ Mookerjee, J. explained the basis of Article 62 in these terms:

"The Article, when it speaks of a suit for money received by the defendant for the plaintiff's use, points to the well-known English action in that form; consequently the Article ought to apply wherever the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which in law render the receipt of it, a receipt by the defendant to the use of the plaintiff."

In other words, the learned Judge held that it was not necessary in order to attract Article 62 that at the moment of the receipt the defendant should have actually intended to receive it for the use of the plaintiff and that it was sufficient if the receipt was in such circumstances that the law would impute to him an obligation to retain it for the use of the plaintiff and refund to him when demanded. In *Biman Chandra v. Promotho Nath*² it was said, following the decision in *Mahomed Wahib v. Mahomed Ameer*¹ that Article 62 most nearly approaches the formula of "money had and received by the defendant for the plaintiff's use, if read as a description and apart from the technical qualifications imported in English Law and Procedure".

A different note was, however, struck by the Calcutta High Court in *Anantham Bhattacharjee v. Hem Chandra Kai*³. It was not a case where the defendant directly received the money from the plaintiff but where a defendant withdrew from the office of the Collector an amount which in law belonged to the plaintiff. The learned Judges held that there was no reason why the artificial form of action of money had and received should be imported to decide a question whether the suit would come under Article 62. Ghose, J. with those judgment Walmsley, J., agreed, took the view that the Article would apply only to a case where the defendant in terms received the money for the benefit of the plaintiff. The learned Judge observed:

"The Common Law form of action for money had and received grew out of the circumstance that at Common Law in England an action *in personam* is maintainable only on contract or on tort. Where therefore an action was not based on tort and the plaintiff was unable to establish any contract by evidence, it was found necessary to have recourse to a fiction of a promise to pay 'implied in law' in order to give relief to the plaintiff and to meet the justice of the case. The history of this form of action and the reasons which led to its extension are set forth in the case of *Snclair v. Brougham*⁴. (Speech of Lord Haldane, L.C. at pages 415-417, and of Lord Sumner at pages 454-456). It is pointed out by Lord Sumner that this was said to be a 'liberal' action in that it was attended by a minimum of formality, and was elastic and readily capable of being adapted to new circumstances. There does not appear to be any sufficient reason why this artificial form of action should be imported in this country in order to decide whether a suit would come under Article 62 of the Limitation Act. In India law and equity are administered by the same Courts, which are untrammelled by any technical rules as to the form of an action in giving relief to the plaintiff, where the defendant has received money which according to the justice of the case he ought to refund. The observations of the Judicial Committee in the case of *John v. Dodwell*⁵ furnish an illustration of this view. In my opinion the plain meaning of the words in Article 62 of the Limitation Act should be given effect to without having recourse to any technical rules of English law regarding forms of action."

1. (1905) I.L.R. 32 Cal. 527 at 533 : 1 Cal. L.J. 167.

2. (1922) I.L.R. 49 Cal. 886 · A.I.R. 1922 Cal. 157.

3. (1923) I.L.R. 50 Cal. 475 at 480 : A.I.R. 1923 Cal. 379.

4. L.R. (1914) A.C. 398.

5. L.R. (1918) A.C. 563.

He then cited the decision of the Privy Council in *Gurudas Pyne v. Ram Narain Sahu*¹ where Article 120 was applied to a claim against a person in a fiduciary position as supporting his views. A similar view was adopted by Chagla, C.J., in *Lingangouda v. Lingangouda*² where the learned Judge preferred to follow *Anantram's case*³ in preference to *Mahomed Wahib's case*⁴. In the case before him he held that the claim of the plaintiff was an equitable claim and not a contractual claim thus attracting not Article 62 but the residuary Article 120. One of the main reasons why Chagla, C.J., held that Article 62 should not apply to a case where the terms of the section were not literally complied with was that such a construction would result in plaintiffs losing a large number of cases on the ground of limitation, whereas if Article 120 were held applicable they would be safe. There are a few other decisions of the High Courts taking a similar view but as these merely follow the Calcutta and the Bombay cases we have referred to, it is unnecessary to detail them.

Having considered the matter carefully we are inclined to prefer the interpretation of the Article by Mookerjee, J., in *Mahomed Wahib's case*⁴. What we are solely concerned with is the meaning of the words employed in the first column of the Article which specifies the nature of the suit dealt with. That they were derived and adopted from the terminology employed in the English action for money had and received is not disputed. The Courts in India being Courts administering both law and equity, no doubt we are not concerned with the technicalities of the English forms of action which originated at a time before the Judicature Acts when law and equity were administered by different Courts. But that is only as regards the merits of a claim and its maintainability in a Court. With great respect to the learned Judges who decided *Anantram's*³ and *Lingangouda's*² cases, we are unable to agree that the changes which the doctrine has undergone in England have any bearing on what the Article meant in 1871 when the Legislature lifted the words descriptive of a form of an English action and incorporated it in the Indian statute. Nor are we impressed with the argument that if the terms of a specific Article do apply to a specific case, one could ignore it and seek a general Article merely on the ground that the latter affords a longer period of limitation for the filing of a suit.

So far as the present claim for recovery of a tax illegally collected is concerned the authorities are fairly uniform that the period of limitation for a suit making such a claim is governed by Article 62. *Rajputana Malwa Railway Co-operative Stores, Ltd. v. The Ajmere Municipal Board*⁵ arose out of a suit against a Municipal Board for refund of certain octroi duty which they were not legally entitled to levy. The suit for that claim was held to be governed by Article 62, the learned Judges stating :

"The language of Article 62 is borrowed from the form of count in vogue in England under the Common Law Procedure Act of 1852. Prior to the passing of the Supreme Court of Judicature Acts of 1873 and 1875, there was a number of forms of pleading known as the common indebitatus counts, such as counts for money lent, money paid by the plaintiff for the use of the defendant at his request, money received by the defendant for the use of the plaintiff, etc. . . . The most comprehensive of the old common law counts was that for money received by the defendant for the use of the plaintiff. This count was applicable where a defendant received money which in justice and equity belonged to the plaintiff under circumstances which rendered the receipt by the defendant to the use of the plaintiff It was a form of claim which was applicable when the plaintiff's money had been wrongfully obtained by the defendant."

A similar view was taken of claims of a like nature in *Municipal Council, Dindigul v. The Bombay Co., Ltd., Madras*⁶, *India Sugar and Refinery, Ltd. v. The Municipal Council, Hospet*⁷, *State of Madras v. A. M. N. A. Abdul Kader*⁸, and *The Municipal Committee,*

1. (1884) I.L.R. 10 Cal. 860. L.R. 11 I.A. 59 (P.C.).

2. (1953) I.L.R. Bom. 214 : A.I.R. 1953 Bom. 79.

3. (1923) I.L.R. 50 Cal. 475 : A.I.R. 1923 Cal. 379.

4. (1905) I.L.R. 32 Cal. 527 : 1 Cal. L.J. 167.

5. (1910) 7 All.L.J. 496 : I.L.R. 32 All. 491.

6. (1928) 56 M.L.J. 525 : I.L.R. 52 Mad. 207 : A.I.R. 1929 Mad. 409.

7. I.L.R. 43 Mad. 521 : A.I.R. 1943 Mad 191.

8. (1953) 2 M.L.J. 181 : A.I.R. 1953 Mad. 905.

*Amritsar v. Amar Das*¹. Learned Counsel submitted that these cases proceeded, in great part, on the inapplicability of the shorter periods of limitation provided in the particular statutes for amounts improperly collected thereunder. We do not, however, consider that this militates, in any manner, from the reasoning upon which the decisions are based, for they all refer to the terms of Article 62, to its scope and their applicability in terms to cases of suit for refund of tax illegally collected. In addition, we might point out that in *India Sugar and Refinery Ltd. v. The Municipal Council, Hospet*² the claim for some of the years for which the suit was filed was dismissed as barred by limitation by applying the three year rule. In fact, learned Counsel conceded that save a solitary decision in *Govind Singh v. The State of Madhya Pradesh*³ to which we shall presently refer, the decisions were uniform in applying Article 62 to cases of suits for refund of taxes illegally collected. We consider that these decisions are correct and they have applied the proper article of limitation.

Before referring to *Govind Singh's case*³ it would be convenient to clarify, the position as regards certain circumstances in which the Article would be inapplicable without making any exhaustive list. Where the defendant occupies a fiduciary relationship towards the plaintiff it is clear that Article 62 is inapplicable. Next even if the claim could have been comprehended under the omnibus caption of the English "action for money had and received," still if there are other more specific articles in the Limitation Act—*vide e.g.* Article 96 (mistake), Article 97 (consideration which fails) Article 62 would be inapplicable. Lastly, if the right to refund does not arise immediately on receipt by the defendant but arises by reason of facts transpiring subsequently, Article 62 cannot apply, for it proceeds on the basis that the plaintiff has a cause of action for instituting the suit at the very moment of the receipt.

It is this last point that was involved in *Govind Singh v. The State of Madhya Pradesh*³ on which learned Counsel relied as a decision which had refused to apply Article 62 and applied Article 120 to a claim for refund of tax overpaid. There the assessee deposited along with his return certain sums. He had overpaid and so was entitled to obtain a refund when the assessment was completed. A suit for the amount of that excess was held to be governed by Article 120. It is clear that at the time when the assessee made the deposit of the tax he was not entitled to the refund. That right accrued to him only after the completion of the assessment. We consider, therefore, that this decision does not assist the appellant in the construction which he seeks to persuade us to adopt of Article 62.

If Article 62 were the proper Article of limitation applicable, Civil Appeal No. 644 of 1962 has to be dismissed as the suit was filed admittedly beyond three years after the receipt of the money by the respondent. There should also have to be a modification in the decree passed in Civil Appeal No. 306 of 1962. The claim in that suit included the amounts collected from the appellant as surcharge in July, 1947, in December, 1947 and November, 1948, *i.e.*, for all the three surcharges. It is common ground that if the three years' period of limitation under Article 62 was applied the claim for the refund of the surcharge imposed in July, 1947, would be beyond time. The appellant is, therefore, entitled only to his claim for the refund of the amounts collected for the surcharges imposed in December, 1947 and November, 1948.

As a result of the foregoing Civil Appeal No. 644 of 1962 shall stand dismissed, but there shall be no order as to costs as the appellant has succeeded on the merits of his claim, though the appeal fails on the ground of limitation.

All the other appeals excepting Civil Appeal No. 306 of 1962 will be allowed and the judgment of the High Court set aside. In Civil Appeals Nos. 101, 131, 168 to 171, 259, 260, 302, 307 to 310, 838, 839 of 1962 and Civil Appeals No. 325,

1. A.I.R. 1953 Punj. 99.

2. I.L.R. 43 Mad. 521 : A.I.R. 1943 Mad. 320.

3. (1961) 12 S.T.C. 825 : A.I.R. 1961 M.P.

437—441 and 996 of 1963 the decrees of the trial Court shall be restored with costs here and in the High Court.

In Civil Appeal No. 306 of 1962 the amount decreed by the trial Court shall be modified by deducting therefrom a sum of Rs. 2,725-14-8 made up of Rs. 2,261-8-0 paid for the surcharge in July, 1947, together with Rs. 464-6-0 being the interest claimed on the said sum. Subject to this modification the decree of the trial Court shall be restored with costs here and in the High Court.

In Civil Appeals No. 303, 837, 840—857 of 1962 the suits will be decreed for the amounts prayed for with costs throughout.

In the computation of the costs in this Court two sets of hearing fees shall be allowed—one set to be shared by the appellants in Civil Appeals Nos. 131, 170, 307 to 309 and 837—857 of 1962 and the other set by the successful appellants in the other appeals to whom we have awarded costs.

ORDER OF THE COURT:—The appeals are disposed of in accordance with the majority judgment.

V.K.

Order accordingly

THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT.—RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

John Douglas Keith Brown

.. - Appellant*

v.

The State of West Bengal

.. Respondent.

Factories Act (LXIII of 1948), sections 2 (n), 52—Managing Agent of a mill—Weekly holiday—No adult worker required to work on the first day of the week—Contravention—Managing Agent as ‘occupier’ liable—Exemptions from the operation of the prohibition—Only to specified workmen and not generally

The prohibition contained in section 52 (1) of the Act that no adult worker shall be required or allowed to work in a factory on the first day of the week is general and is not confined to the Manager. It would therefore follow that where something is done in breach of the prohibition enacted by that section both the Manager as well as the Managing Agent as occupier will be liable to the penalties prescribed in that section.

What the provisions of sections 52 (1)(a) and (b) permit is to grant exemptions to specified workmen from the operation of the prohibition enacted in section 52 from working in factories on weekly holidays. No general permission can be granted for altering the day of the weekly holiday so as to cover all the workmen.

Appeal from the Judgment and Order dated the 11th September, 1961, of the High Court of Calcutta in Criminal Revision No. 362 of 1961.

J. N. Ghosh, Senior Advocate (Nutbehari Mukherjee and Sukumar Ghose Advocates, with him), for Appellant.

K. B. Bagchi, and B. N. Kirpal, Advocates for P. K. Bose, Advocate, for Respondent.

The Judgment of the Court was delivered by

Mudholkar, J.—The only point urged in this appeal from a decision of the High Court at Calcutta is whether the occupier of a factory is liable to penalty under section 92 of the Factories Act, 1948 (hereinafter referred to as the Act) for the contravention of the provisions of section 52 of the Act.

The appellant is the Managing Director of Jardine Henderson Ltd., Calcutta, who are the managing agents of the Howrah Mills Co., Ltd., of Ramkrishnapur, District Howrah and as such “occupiers” of the Mills within the definition of the term contained in section 2 (n) of the Act. One J. P. Bell was the Manager of the Mills in June, 1957. Both the appellant and Bell were charged with an offence

under section 92 of the Act read with section 52. It would appear, however, that during the pendency of the trial the Manager was permitted to proceed to England and the prosecution continued against the appellant alone. He was convicted of the offence and sentenced to pay a fine of Rs. 400 by the Sub-Divisional Magistrate Howrah. His appeal therefrom was dismissed by the Sessions Judge Howrah. Similarly, the revision application preferred by him before the High Court was also dismissed. However, the High Court granted him a certificate to the effect that the case was fit for appeal to this Court and that is how the matter has come up before us.

Reliance was placed before us on behalf of the appellant upon the decision in *State Government of Madhya Pradesh v. Maganbhai Dasabhai*¹, to which I was a party in support of the contention that where a duty is cast upon a Manager of a factory to perform a particular act his omission to do so will not render the occupier vicariously liable under section 92. The contention of the appellant is that under clause (b) of sub-section (1) of section 52 of the Act a duty is cast upon the Manager of the factory to give a notice to the appropriate authority of a change in the weekly holiday from the first day of the week to any other day and not upon the occupier. According to learned Counsel the omission of the Manager to give such notice would not render the occupier liable in any way unless it is shown that there was any connivance on his part of a breach of duty by the Manager. This, it is contended, must necessarily imply that unless the occupier had the *mens rea* to contravene the provision of section 52 (1) of the Act he would not be liable for the contravention. In the absence of any evidence to the effect that the appellant knew of the omission and yet connived at it his conviction and sentence ought, therefore, to be quashed.

Sub-section (1) of section 52 reads thus :

"No adult worker shall be required or allowed to work in a factory on the first day of the week (hereinafter referred to as the said day), unless—

(a) he has or will have a holiday for a whole day on one of the three days immediately before or after the said day, and

(b) the manager of the factory has, before the said day or the substituted day (under clause (a) whichever is earlier,—

(i) delivered a notice at the office of the Inspector of his intention to require the worker to work on the said day and of the day which is to be substituted, and

(ii) displayed a notice to that effect in the factory:

Provided that no substitution shall be made which will result in any worker working for more than ten days consecutively without a holiday for a whole day."

The opening words of this sub-section indicate a prohibition from requiring or permitting an adult worker to work in a factory on the first day of the week. The prohibition is, however, lifted if steps are taken under clauses (a) and (b) of that section. A perusal of clause (b) makes it abundantly clear that what is required to be done thereunder, that is to say, to give and display a notice is only for the purpose of securing an exemption from the prohibition contained in the opening parts of section 52 of the Act. Clause (b) cannot, therefore, be linked to some other provisions of the Act which impose a positive duty upon the Manager to do something. The prohibition contained in the opening words of this sub-section is general and is not confined to the Manager. It would, therefore, follow that where something is done in breach of the prohibition enacted by sub-section (1) of section 52 both the Manager as well as the occupier will be liable to the penalties prescribed in that section.

We may also point out that exemption from compliance with the provisions of section 52 was refused by the Chief Inspector of Factories as would be clear from the second paragraph of his reply dated 8th April, 1957 to the Manager. It runs thus :

"It is however, pointed out that instead of employing workers of C Shift from Sunday evenings it would be advisable to employ them on Saturday evenings. The work done by these workers after

midnight on Saturdays which would be continued upto the following morning will be considered towards the work done on Saturdays. In that case, submission of notice under section 52 of the Act would not be necessary."

That being the position, we would have had an occasion to consider *Maganbhai's case*¹ if it were the appellant's case that the weekly holiday had been altered without his knowledge or consent. But that is not so. Moreover, there is ample material to show that what the Manager did was within the full knowledge of the appellant and, presumably, was also with his consent. In this connection we may point out that on 18th January, 1957, the Manager of the Mills sent a letter to the Chief Inspector of Factories which runs thus :

" HOWRAH MILLS COMPANY LTD.

Howrah, West Bengal,
18th January, 1957.

Ref. No. G. 12/4968.

The Chief Inspector of Factories,
New Secretariat Building, Calutta.

Dear Sir,

We request your permission to operate the batching to winding departments in No. 1 Mill, as shown on the attached sheet with effect from Sunday the 27th January, 1957.

An early reply would be appreciated.

It will be noted that all shifts will then work 48 hours per week.

Yours faithfully,
(Sd.) J. P. Bell,
Mill Manager."

A copy of this letter was sent to M/s. Jardine Henderson Ltd., Calcutta of which the appellant is admittedly the Managing Director. From the letter of the same date addressed to the Manager by the General Secretary of Howrah Jute Mills Karmachari Sangha it would appear that the workers categorically refused to work according to the schedule proposed by the Mill Manager. The Sangh, however, proposed alternative working hours for the "C" shift and there it is suggested that the workers would work on Sunday from 8-30 P.M. to 6-00 A.M. This schedule was also accepted by the National Union of Jute Workers to which some of the workmen in the Mills belong. This would appear from the letter of its Joint Secretary, dated 21st January, 1957. On 5th February, 1957, the Mill Manager wrote another letter to the Chief Inspector of Factories requesting for approval of the new schedule of working hours. It may be mentioned that even in the original schedule of working hours which is appended to the letter of 18th January, 1957, by the Mill Manager the starting time of the first shift was also 8-30 P.M. on Sunday. On 9th February, 1957, the Chief Inspector of Factories asked the Mill Manager to forward the resolution of the Works Committee of the Factory or other documents to show that the workers had agreed to work in the factory at 8-30 P.M. on Sundays. The Manager's reply to it was as follows :

" Dear Sir,

Re : Treble shift working in No. 1 Mill.

With reference to your letter No 818, dated 9th February, 1957, we forward herewith as desired by you two original letters with one true copy of each from the General Secretary of Howrah (Jute) Mills Karmachari Sangha and Joint Secretary of National Union of Jute Workers requesting the management to adopt the existing working hours of the "C" shift in No. 1 Mill.

We trust this will be found to be in order and would request you to kindly return the original letters after your perusal.

Yours faithfully,
J. B. Bell
Mill Manager."

A copy of this letter was also sent to M/s. Jardine Henderson Ltd. The fact that copies of letters of 18th January, 1957 and 18th February, 1957, were sent to Jardine

Henderson Ltd., would fix the occupier i.e., the appellant before us, with the knowledge of what the Manager had proposed to do. Therefore, quite apart from the fact that as the Managing Director of Jardine Henderson Ltd., who were themselves the Managing Agents of the Howrah Mills, the appellant must be deemed to have known what was being done by the Manager of the Mills. We have positive evidence of the fact that the Manager had apprised him of what he was proposing to do. The appellant took no steps to restrain the Manager from putting the new schedule in operation which was in itself in violation of the opening words of section 52. We may further point out that what the provisions of section 52 (1) (a) and (b) permit is to grant exemptions to specified workmen from the operation of the prohibition enacted in section 52 from working in factories on weekly holidays. No general permission can be granted under classes (a) and (b) of sub-section (1) of section 52 for altering the day of the weekly holiday so as to cover all the workmen. Therefore, upon the proper construction of the provisions it is clear that whenever workers are required (or are permitted) to work on a weekly holiday the specific permission of the Chief Inspector of Factories in respect of each and every worker who is required to work on such a day should be obtained. That being the provision of law the occupier must be deemed to have known it. Being duly apprised of the fact that the Mill Manager was seeking to start the 'C' shift from 8-30 P.M. on Sunday without specifically mentioning the names of those workmen who had to work in that shift he was doing something which was not within the purview of clauses (a) and (b) of sub-section (1) of section 52. Of this fact the occupier had actual knowledge and, therefore, he must be held guilty of the contravention of the provisions of section 52 of the Act.

The appeal is, therefore, dismissed.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction)

PRESENT :—RAGHUBAR DAYAL, J. R. MUDHOLKAR AND S. M. SIKRI, JJ.

Chittoori Subbanna

.. *Appellant**

v.

Kudappa Subbanna and others

Respondents.

Civil Procedure Code (V of 1908), sections 11, 97, Order 20, rule 12 (1) (c) and Order 41, rule 2—Pure question of law—If can be raised for first time before appellate Court—Discretion of appellate Court—Interference with by Supreme Court—Preliminary decree for mesne profits until delivery of possession—Proper construction—No appeal filed from such a preliminary decree—Judgment-debtor if precluded by section 11 or section 97 from contending that mesne profits cannot be awarded for more than three years from the date of the preliminary decree

By majority.—A pure question of law not dependent on the determination of any question of fact can be urged at any stage of the litigation be it in the Court of last resort

An appellant cannot at the hearing of an appeal claim a right to urge a new point which has not been taken in the grounds of appeal. But he can make a separate application for permission to take up such a point and if such an application is made, the appellate Court will have discretion to allow the application or refuse it. The discretion exercised by the appellate Court (High Court in the instant case) is certainly not to be interfered with by the Supreme Court except for good reasons.

Per Mudholkar, J.—It is right and proper that parties to a litigation should not be permitted to set up the grounds of their claims or defence in dribblets or at different stages and embarrass the opponents. Considerations of public policy require that a successful party should not, at the appellate stage, be faced with new grounds of attack after having repulsed the original ones. The proper function of an appellate Court is to correct an error in the judgment or proceedings of the Court below and not to adjudicate upon a different kind of dispute, a dispute that was never taken before the Court below. It is only in exceptional cases that the appellate Court may in its discretion allow a new point to be raised before it provided there are good grounds for allowing it to be raised and no prejudice is caused

thereby to the opponent of the party permitted to raise such point. But where the appellate Court in exercise of its discretion refuses leave to a party to raise such point there is little scope for any indulgence being shown by the Supreme Court.

Where a party omits to raise an objection to a direction given by the lower Court in its judgment, he must be deemed to have waived his right and he cannot, for the first time at the hearing of an appeal from the decision of that Court challenge its power to make the direction.

Held on the facts, (by majority with *Mudholkar, J.*, dissenting), that the High Court was in error in refusing to allow the appellant to raise, at the stage of the hearing of an appeal from a final decree granting mesne profits, the pure question of law that mesne profits could not be granted for more than three years from the date of the preliminary decree. The omission of the appellant to raise the point before the trial Court did not amount to his waiving his right to raise the objection and no prejudice would have been caused to the respondent by the appellant raising the new ground at the hearing of the appeal.

By majority (*Mudholkar, J.* dissenting) — Where a preliminary decree is passed directing an enquiry as to mesne profits from the institution of the suit until delivery of the immovable property to the decree-holder, the decree should be construed to mean a direction for an enquiry upto the date of delivery or upto three years from the date of the decree whichever be earlier. The language of Order 20, rule 12 (1) (c) of Civil Procedure Code makes it clear that a Court cannot direct an enquiry and pass a final decree with respect to mesne profits for a period exceeding three years from the date of the preliminary decree and therefore when a preliminary decree does not mention the period for which mesne profits would be paid or states that mesne profits would be payable upto the delivery of possession, the decree should be so construed as to be in accordance with Order 20, rule 12 (1) (c).

The decree is so construed not on account of the vagueness of the expressions used for decreeing mesne profits or directing the enquiry about mesne profits but on account of the fact that the decree for future mesne profits or direction about them is not based on the decision of any controversy between the parties but is made in the exercise of the discretionary power vested in the Courts by the provisions of Order 20, rule 12 (1) (c) of the Civil Procedure Code. The Court is deemed to exercise the power in accordance with the law and a decree which decrees or directs enquiry about mesne profits for the period of dispossession or until delivery is construed as a decree for mesne profits for a period of three years from the date of the decree if possession is not delivered within that period.

When a preliminary decree directs an enquiry into mesne profits upto the date of delivery of possession the Court does not decide the period for which the decree-holder would be entitled to get mesne profits. Hence the fact that in such a case no appeal has been preferred from the preliminary decree would not preclude the judgment-debtor from contending, at the time of the passing of the final decree or in an appeal from the final decree that mesne profits could not be awarded for a period exceeding 3 years from the date of the preliminary decree. Section 97 of the Civil Procedure Code would not be applicable to such a case. The question about the proper period for which mesne profits was to be decreed really comes up for decision only at the time of passing the final decree.

Nor does such a direction in the preliminary decree operate in terms of section 11 of Civil Procedure Code, or on general principles as *res judicata* for the simple reason that the direction is not based on the decision of any matter in controversy between the parties but is given in the exercise of the discretionary power vested in the Court under Order 20, rule 12 (1) (c). Again for similar reasons, the principle that a Court can decide a question within its jurisdiction wrongly as well as rightly and if the decision said to be wrong had become final the Courts have to respect it, will not apply to these cases.

Per *Mudholkar, J.* (dissenting) — The question of construction of a decree can only arise where the decree is ambiguous. A preliminary decree which directs an enquiry into mesne profits upto the date of delivery of possession does not suffer from vagueness, ambiguity or such incompleteness as to make its enforcement impossible. It would not be right for a Court to characterise a term of a decree which upon its face appears to be clear and complete, as being vague or incomplete merely because in its view that term is erroneous and then proceed to interpret it.

Even assuming that the direction in the preliminary decree that mesne profits shall be determined and consequently will be payable right up to the date of delivery of possession whenever the event occurred is wrong that decision has to be given effect to when it is not challenged by taking a further appeal and has become final by the operation of the provisions of section 97 of the Code of Civil Procedure. Even assuming that one of the terms of a decree is erroneous in law the decree is nonetheless

binding upon the parties until and unless it is corrected in appeal or other appropriate proceeding. Such a decree cannot be treated as one passed without jurisdiction. For, it is well settled that while it is the duty of a Court to decide right it may well happen that it decides wrong. Whichever way it decides, it acts within its jurisdiction and not beyond it. A wrong decision is no doubt vulnerable but it does not automatically become unenforceable. Unless corrected in the manner provided for in the Code of Civil Procedure it will operate as *res judicata* between the parties in all subsequent stages of the *lis*.

Appeal from the Judgment and Decree dated the 13th September, 1958 of the Andhra Pradesh High Court in Appeal Suit No. 736 of 1952.

A. V. Viswanatha Sastri, Senior Advocate (*K. Rajindra Chaudhuri* and *K. R. Chaudhuri*, Advocates, with him), for Appellant.

K. Bhimasankaram and K. N. Rajagopala Sastri, Senior Advocates (*T. Satyanarayana*, Advocate, with them), for Respondent No. 1.

The Court delivered the following Judgments

Raghubar Dayal, J. (on behalf of himself and *S. M. Sikri, J.*) :—This appeal presented on a certificate granted by the High Court of Andhra Pradesh, arises out of execution proceedings in execution of a decree dated 7th March, 1938. Kudappa Subbanna, plaintiff No. 2 and respondent No. 1 here, was held entitled to the properties mentioned in Schedules A and C and to 1/24th share in the properties mentioned in Schedule B attached to the plaint. The defendants in possession of the properties were directed to deliver possession to the decree-holder. The properties in Schedule B were first to be divided in accordance with the shares specified in paragraph 9 of the plaint and the decree-holder was to be allowed the share to which the first plaintiff was shown to be entitled. The trial Court was directed to make an enquiry into the mesne profits from the date of the institution of the suit and pass a final decree for payment of the amount that he found due upto the date of delivery of possession to the second plaintiff. Possession over the properties in Schedules A and C was delivered to the decree-holder on 17th, 18th and 20th February, 1943. On 23rd June, 1945, the decree-holder filed I.A. No. 558 of 1945 to revive and continue the earlier I.A. No. 429 of 1940 which had been presented for the ascertainment of future profits and was struck off on 25th September, 1944. On 28th July, 1948, the Subordinate Judge decreed the mesne profits and interest thereon for the period from 1926-27 to 1942-43 with respect to the A and C Schedule properties. The amount decreed was Rs. 17,883-8-3 including Rs. 10,790 for mesne profits. He also decreed mesne profits with respect to the B Schedule properties upto 1946. They are not in dispute now.

On 22nd April, 1949, Chittoori Subbanna, 1st defendant, appealed to the High Court. The decree-holder filed cross-objections and claimed Rs. 19,000 more stating that the amount of mesne profits actually due to him would be about Rs. 45,000 but he confined his claim to Rs. 19,000 only.

On 13th September, 1958, the High Court dismissed the appeal, but allowed the cross-objection, the result of which was that the amount of mesne profits decreed by the Subordinate Judge with respect to the A and C Schedule properties was increased very substantially. The amount decreed for mesne profits was raised to Rs. 17,242-12-0 and, consequently, the amount of interest also increased. Chittoori Subbanna then obtained leave from the High Court to appeal to this Court as the decree of the High Court was one of variance and the value of the subject-matter in dispute was over Rs. 10,000.

Chittoori Subbanna, appellant, applied to the High Court for permission to raise an additional ground of appeal to the effect that the trial Court was not entitled to grant mesne profits for more than 3 years from the date of the decree of the High Court. The High Court disallowed that prayer for the reasons that he had not taken such a ground in the memorandum of appeal and had, on the other hand, conceded before the Commissioner and the trial Court that accounts could be taken upto 1943 in respect of A and C Schedule properties, that he had elected to have the profits

determined by the trial Court upto the date of delivery of possession and that if he had taken the objection earlier, it would have been open to the second plaintiff-respondent to file a suit for the recovery of mesne profits beyond the three years upto the date of delivery of possession. It is urged before us for the appellant that the High Court was in error in not allowing the appellant to have raised the objection based on the provisions of Order 20, rule 12, Civil Procedure Code. We agree with this contention. The question sought to be raised was a pure question of law and was not dependent on the determination of any question of fact. The first appellate Court ought to have allowed it. Such pure questions of law are allowed for the first time at later stages too.

The appellant could not have claimed—and did not claim—a right to urge the new point which has not been taken in the grounds of appeal. He made a separate application for permission to take up that point. The procedure followed was in full conformity with what had been suggested in *Wilson v. United Counties Bank, Ltd.*¹ to the effect :

“ If in exceptional cases parties desire to add new grounds to those of which they have given notice, it will usually be convenient, by a substantive application, to apply to the indulgence of the Court which is to hear the appeal.”

In *Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari*², this Court allowed a question of law to be raised at the hearing of the appeal even though no reference to it had been made in the Courts below or in the grounds of appeal to this Court. This Court said :

“ If the facts proved and found as established are sufficient to make out a case of fraud within the meaning of section 18, this objection may not be serious, as the question of the applicability of the section will be only a question of law and such a question could be raised at any stage of the case and also in the final Court of appeal. The following observations of Lord Watson in *Connecticut Fire Insurance Co. v. Kavanagh*³, are relevant. He said: When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below.”

Again, it was said in *M. K. Ranganathan v. Government of Madras*⁴ :

“ The High Court had allowed the Respondent 3 to raise the question even at that late stage inasmuch as it was a pure question of law and the learned Solicitor-General therefore rightly did not press the first contention before us.”

In *Ittavaira Mathai v. Varkey Varkey*⁵, this Court did not allow the question of limitation to be raised in this Court as it was considered to be not a pure question of law but a mixed question of law and fact. This Court said at page 911 :

“ Moreover, the appellants could well have raised the question of limitation in the High Court in support of the decree which had been passed in their favour by the trial Court. Had they done so, the High Court would have looked into the records before it for satisfying itself whether the suit was within time or not. The point now raised before us is not one purely of law but a mixed question of fact and law. No specific ground has even been taken in the petition made by the appellant before the High Court for grant of a certificate on the ground that the suit was barred by time. In the circumstances, we decline leave to the appellant to raise the point of limitation before us.”

The High Court had discretion to allow the application or to refuse it. The discretion exercised by the High Court is certainly not to be interfered with by this Court except for good reasons.

We shall deal with the reasons given by the High Court for rejecting the application and, in so doing, indicate why we consider those reasons not to be good reasons for disallowing the prayer made in the application.

1. L.R. (1920) A.C. 102, 106
 2. L.R. (1950) S.C.R. 852; (1951) S.C.J. 19 : 315 (1955) 11 S.C.R. 374, 381 (1955) S.C.J.
 A.I.R. 1951 S.C. 16. 604. (1955) 2 M.L.J. (S.C.) 68; A.I.R. 1955 S.C.
 3. L.R. (1892) A.C. 473. 5 (1964) 1 S.C.R. 495. A.I.R. 1964 S.C. 907.

In *Rehmat-un-Nissa Begam v. Price*¹, the observations at page 66 indicate that a discretionary order can be justifiably disturbed if the Court acts capriciously or in disregard of any legal principle in the exercise of its discretion. This, however, cannot be taken to be exhaustive of the grounds on which the discretionary order is to be interfered with. In this particular case the order passed by the High Court was not in conformity with the principle that a question of pure law can be urged at any stage of the litigation, be it in the Court of the last resort.

There was no question of the appellant's conceding before the Commissioner that mesne profits could be legally allowed up to the date of delivery of possession. No party had raised the question as to whether mesne profits could be allowed up to three years subsequent to the date of the High Court decree or up to the later date when possession was delivered. When no such dispute arose, there was no question of the appellant's making any such concession. Similarly, no question of the appellant's electing to have the profits determined by the trial Court up to the date of delivery of possession could have arisen when no dispute about this matter had arisen between the parties. The utmost that can be said is that both the parties, the decree-holder and the judgment-debtor, were under the impression that mesne profits could be awarded till the date of delivery of possession as directed by the decree of the High Court. The fact that the appellant raised no such objection before the Commissioner or the trial Court, does not mean that he had given his consent for the determination of mesne profits for the period subsequent to the expiry of 3 years from the date of the High Court decree and that the order of the trial Court for the payment of mesne profits up to the date of delivery of possession is an order based on the consent of the parties.

In the circumstances of the case, we are not prepared to hold that the omission of the appellant to raise the point before the trial Court amounts to his waiving his right to raise the objection on the basis of Order 20, rule 12, Civil Procedure Code.

The case reported as *London, Chatham and Dover Railway Co. v. South-Eastern Railway Co.*² is not to the point. The facts of that case were different. An agreement between two railway companies under the authority of an Act of Parliament contained a provision that all matters in difference between them would be referred to arbitration under the Railway Companies Arbitration Act (22 & 23 Vict. c. 59). Section 26 of that Act provided that full effect should be given by all the superior Courts of law and equity in the United Kingdom, according to their respective jurisdiction... to all agreements, references, arbitrations and awards, in accordance with the Act. This provision was construed not to oust the jurisdiction of the ordinary Courts, but in case of any party insisting on the compliance of the condition in the agreement of disputes being referred to arbitration, the Court was to stay its hands and to order the case to be withdrawn from the Court. The case was decided by the Court when an appeal against the finding that the agreement was valid was pending before the House of Lords. It is not clear and may, however, be assumed that one of the questions in the appeal was whether the jurisdiction of the Court was ousted if the agreement be a good one. The House of Lords and the Court of Appeal did not decide that point as it is noted at page 101 :

"but their Lordships expressly stated that the judgment of the House of Lords, and also the judgment of the Court of Appeal, only decided that the High Court of Justice had jurisdiction to try the question of the validity of the agreement, and did not decide the question whether the matters in dispute arising under the agreement ought to be tried by arbitration."

One of the parties applied to the Court to postpone the trial of the action on the ground that certain points other than the point regarding the ouster of jurisdiction of the Court were before the House of Lords for decision. The prayer was rejected. The parties went on with the trial of this action and got a judgment of the Court upon the evidence on the matter in dispute between them. It was urged in the Court of Appeal that the Court had no jurisdiction to try that matter and that it could be

1. (1917) 35 M.L.J. 262; L.R. 45 I.A. 61; A.I.R. 1917 P.C. 116. 2. (1389) L.R. 40 Ch.D. 100.

determined only in arbitration. The Court of Appeal said the the Court was not deprived of its jurisdiction to determine the matters in dispute if neither party insisted on arbitration and that the parties ought not to be allowed to raise the point of jurisdiction. The reason given by Cotton, L.J., at page 105, is stated thus :

"If when they can insist on the Court not going into the merits of the case and deciding questions between the parties, they abstain from doing so, and are defeated on the merits, in my opinion it is too late to insist before the Court of Appeal on any right to object to the jurisdiction of the Court which they might have had if they had insisted on it in a proper way and at a proper time."

In the present case the appellant did not let the trial Court determine the question of the period up to which mesne profits could be decreed as he had raised no controversy in this respect. He did not take a chance of the judgment being given one way or the other and therefore the attempt of the appellant to raise the question in the High Court was not to get round the judgment of the Court which happened to go against him.

The Commissioner conducted the enquiry about mesne profits from 29th August, 1946 till 4th December, 1947. Suits for mesne profits for the periods between 7th March, 1941 and 28th February, 1943 could not be instituted in August, 1946 as the period of 3 years' limitation for the institution of a suit for mesne profits of those years had expired by then. It follows that even if the appellant had raised the objection that mesne profits could not be decreed for the period subsequent to 7th March, 1941, the decree-holder respondent could not have sued in Court for the recovery of those mesne profits when he had failed to sue for them within the specified period of limitation and therefore could not have been prejudiced by the appellant's raising the new ground at the hearing of the appeal.

We are therefore of opinion that the High Court was in error in not allowing the appellant to urge this additional ground before it.

The main point for determination in this appeal is whether mesne profits could be awarded to the decree-holder for a period subsequent to the expiry of three years from the date of the High Court's decree, i.e., subsequent to 7th March, 1941. The contention for the judgment-debtor is that mesne profits cannot be awarded for the period subsequent to 7th March, 1941 in view of the provisions of Order 20 rule 12, Civil Procedure Code which reads :

"12. (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

- (a) for the possession of the property ;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits,
- (c) directing an enquiry as to rent or mesne profits from the institution of the suit until—
 - (i) the delivery of possession to the decree-holder,
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs
- (2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry."

It is urged that the direction in the decree for an inquiry into the mesne profits up to the date of delivery of possession should be construed to mean a direction for an inquiry into the mesne profits up to the date of delivery of possession or up three years from the date of the decree, whichever be earlier, as that would be consistent with what the law provides. In support of the contention, reference has been made to *Girish Chunder Lahiri v. Shashi Shikharaswar Roy*¹ and to other cases which followed that decision. The contention for the decree-holder is that the preliminary decree directed the enquiry into the mesne profits from the date of the institution of the suit up to the date of delivery of possession and that this direction

¹ (1900) 10 M.L.J. 356: L.R. 27 I.A. 110.

in the decree cannot be ignored, when inquiring into the mesne profits or when passing the final decree, even if it be not in full conformity with the law laid down in rule 12 of Order 20. It has also been urged that the judgment-debtor is estopped from raising the contention that he is not liable to pay mesne profits subsequent to 7th March, 1938 in view of his conduct amounting to his consent in the award of mesne profits subsequent to 7th March, 1938. We have already held that the appellant's conduct did not amount to his consenting to mesne profits being decreed for the period subsequent to 7th March, 1941.

There is no provision of law other than the provision of rule 12, Order 20, Civil Procedure Code which empowers the Court to decree mesne profits subsequent to the institution of a suit for the recovery of possession of immovable property and mesne profits. It is not disputed for the respondent decree-holder that rule 12, Order 20, does not empower a Court to direct an inquiry and pass a final decree with respect to mesne profits for a period exceeding 3 years from the date of the decree. This is very clear from the language of this rule. The only question is whether a decree wherein the Court does not mention the period for which mesne profits would be paid or the Court states that mesne profits would be payable up to the delivery of possession, should be construed to be a decree directing that mesne profits would be decreed for a period of 3 years from the date of the decree, if possession be not delivered within that period. The precedent case-law is in favour of the contention for the appellant. The *ratio decidendi* mainly is that the Court had no power to pass a decree against the clear provisions of rule 12, Order 20, and that therefore the decree should be so construed as to be in accordance with these provisions.

The law with respect to the decree for mesne profits had been changing from time to time, but all the same the expressions in the decree about the period for which mesne profits were to be awarded have been considered to be matters of construction and had been construed in accordance with the law at the relevant time.

Sections 196 and 197 of the Code of Civil Procedure of 1859 (Act VIII of 1859) dealt with the decree for mesne profits. Section 196 provided that when the suit was for land or other property paying rent, the Court might provide in the decree for the payment of mesne profits or rent on such land or other property from the date of the suit until the date of delivery of possession to the decree-holder, with interest thereon at such rate as the Court may think proper. It is to be seen that the Court was not merely to direct an enquiry about mesne profits and then to pass a decree as the present provisions require and that there was no limitation about decreeing mesne profits for a period of 3 years only from the date of the decree. Mesne profits could be decreed up to the delivery of possession. The decree was for mesne profits which were to be determined in execution.

In *Fakharuddin Mahomed Ahsan Chowdhry v. Official Trustee of Bengal*¹ the High Court decree declared the plaintiff to be entitled to possession of the land mentioned in the kabinnama with wasilat from the commencement of Srabun 1267 and did not say in express terms the time up to which the wasilat were to be paid. The plaint was also not very clear in stating the time up to which wasilat were claimed. The Privy Council construed the decree to award mesne profits up to the delivery of possession as the reasonable construction would be that the Court, with a view to carrying out the object of the Legislature, *viz.*, the prevention of unnecessary litigation and multiplication of suits, intended to give, with possession, that wasilat which was by law claimable up to the time of possession.

Section 211 of the Code of Civil Procedure, 1882 (Act XIV of 1882) provided for decreeing the mesne profits up to delivery of possession or up to 3 years after the decree, whichever event took place earlier. The change of law therefore restricted the power of the Court to grant mesne profits to a period up to 3 years from the date of the decree. In *Girish Chunder's case*² the Privy Council had to consider a decree for mesne profits which was passed when section 211 was in force. The

1. (1881) L.R. 8 I.A. 197.

2. (1903) 10 M.L.J. 356 : L.R. 27 I.A. 110.

decree in that case, which went up to the Privy Council, was passed in 1883 and had provided that the decree-holder would get mesne profits for the period of dispossession. Possession over the village *N* was not recovered till 1892. The trial Court allowed mesne profits with respect to that village up to the date of delivery of possession. The High Court did not agree and allowed mesne profits for only 3 years after the date of the decree. It was said at page 126 :

"As to the village of *N*, their Lordships agree with the High Court. The Subordinate Judge gives the plaintiff mesne profits up to the date of possession. But that is more than three years from the date of the decree, and to the extent of the excess is unauthorized by section 211 of the Code."

The principle enunciated in this case about the construction of the decree for mesne profits for the period of dispossession was followed subsequently by the various High Courts on the ground that the Court had no power to award mesne profits for a period beyond three years from the date of the decree and that therefore the decree should be construed to be subject to the condition that if possession is not delivered within three years of the decree, the mesne profits would be awarded for the period of three years from the date of the decree. These views were expressed in connection with decrees which either did not specify any period for the payment of mesne profits or expressly stated that mesne profits would be payable only until delivery of possession.

In *Venkata Kumara v. Subbayamma*,¹ *Uttamram v. Kishordas*² and *Trailokya v. Jogendra*³ the decree simply mentioned the starting point of the period for which mesne profits were decreed or for which an enquiry about them was to be made. It may be said, as urged for the respondent, that it was open to the Courts to construe the decree when the actual language of the decree did not indicate the other terminus of the period for which mesne profits could be claimed. It was however not so in *Girish Chunder's case*⁴ where the decree provided that the decree-holder would get mesne profits for the period of dispossession. Similarly in *Godavarti Raja v. Ramachandraswami*⁵, *Narayan v. Sono*⁶, *Kunwar Jagdish Chandra v. Bulaqi Das*⁷ and *Kanal Lal v. Shyam Kishore*⁸ the decree allowed mesne profits for the period of dispossession. It cannot be said that the decree in these cases was in any way vague or incomplete in the sense that its meaning was not clear. Yet in all these cases the Courts construed the decree in a manner as would make it in accordance with the law as laid down in rule 12, Order 20, Civil Procedure Code.

The decrees have been so construed not on account of the vagueness of the expressions used for decreeing mesne profits or directing the inquiry about mesne profits but on account of the fact that the decree for future mesne profits or directing enquiry about them is not based on the decision of any controversy between the parties but is made in the exercise of the discretionary power vested in the Courts by the provisions of Order 20, rule 12 (1) (c), Civil Procedure Code. The Court is deemed to exercise the power in accordance with law and therefore a decree which decrees or directs enquiry about mesne profits for the period of dispossession or until delivery of possession is construed as a decree for mesne profits for a period of three years from the date of the decree if possession is not delivered within that period. This power was given to the Court in order to avoid multiplicity of suits between the decree-holder and the judgment-debtor for mesne profits which the decree-holder could rightly claim. The period was, however, restricted to three years in order to discourage decree-holders from making delays in taking possession. If a decree-holder be not diligent in executing the decree, he would have to forego mesne profits for the period in excess of three years or would have to institute separate suits to recover them. The Privy Council did not pass its order in *Girish Chunder's case*⁴ on the basis of the decree being vague or incomplete. It simply held that the decree for a period in excess of three years was not authorized by section 211 of the Code of Civil Procedure of 1882.

1. A.I.R. 1915 Mad. 226.

2. (1899) I.L.R. 24 Bom 149.

3. (1908) I.L.R. 35 Cal 1017.

4. (1900) 10 M.L.J. 356; L.R. 27 I A 110

5. (1943) 1 M.L.J. 253; A.I.R. 1943 Mad.

354.

6. (1899) I.L.R. 24 Bom 345.

7. (1959) I.L.R. 1 All 114.

8. A.I.R. 1959 Cal. 76.

We are therefore of opinion that it is open to the Court to construe the direction in the preliminary decree about the inquiry with respect to future mesne profits when such direction is not so fully expressed as to cover all the alternatives mentioned in Order 20, rule 12 (1) (c), Civil Procedure Code and to hold that the decree be construed in accordance with these provisions.

It is urged for the decree-holder respondent that the trial Court, when passing the final decree, could not have ignored what had been decreed under the preliminary decree as no appeal against the preliminary decree had been preferred and section 97, Civil Procedure Code, provided that where any party aggrieved by a preliminary decree passed after the commencement of the Code did not appeal from such decree, it would be precluded from disputing its correctness in any appeal which might be preferred from the final decree. The object of section 97 is that questions which had been urged by the parties and decided by the Court at the stage of the preliminary decree will not be open for re-agitation at the stage of the preparation of the final decree and would be taken as finally decided if no appeal had been preferred against the preliminary decree. The provisions of this section appear to be inapplicable to the present case.

The preliminary decree directed an inquiry about the mesne profits from the date of the institution of the suit up to the date of delivery of possession to the decree-holder. The decree-holder could not have felt aggrieved against this order. The judgment-debtor could not have insisted for detailing all the various alternatives mentioned in Order 20, rule 12 (1) (c) and he could not have expected that possession would not be taken within three years of the decree. The direction about the enquiry with respect to future mesne profits does not amount to an adjudication and certainly does not amount to an adjudication of any controversy between the parties in the suit. It has no reference to any cause of action which had arisen in favour of the plaintiff-decree-holder before the institution of the suit. The direction was given on account of a special power given to the Court under Order 20, rule 12 (1) (c) of the Code to make such a direction if it considered it fit to do so. It was within the discretion of the Court to make the direction or not. The Court does not decide, when making such a direction, the period for which the decree-holder would be entitled to get mesne profits. No such point can be raised before it. The judgment-debtor's liability to mesne profits arose under the ordinary law and a suit for realizing mesne profits could be separately filed, by the decree-holder. The provisions of Order 20, rule 12 (1) (c), are just to avoid multiplicity of suits with consequent harassment to the parties. The mere fact that the direction for an enquiry into mesne profits is contained in a preliminary decree does not make it such a part of the decree against which alone appeal could have been filed. The appeal could be filed only after a final decree is passed decreeing certain amount for mesne profits to the decree-holder. It follows that the question about the proper period for which mesne profits was to be decreed really comes up for decision at the time of passing the final decree by which time the parties in the suit would be in a position to know the exact period for which future mesne profits could be decreed in view of the provisions of Order 20, rule 12 (1) (c).

The direction in the preliminary decree cannot operate, in terms of section 11, Civil Procedure Code, or on general principles, as *res judicata*, for the simple reason, as stated earlier, that the direction is not based on the decision of any matter in controversy between the parties and is given in the exercise of the power vested in the Court under Order 20, rule 12 (1) (c). Again, for similar reasons, the principle that a Court can decide a question within its jurisdiction wrongly as well as rightly and, if the decision said to be wrong had become final, the Courts have to respect it, will not apply to these cases.

We therefore hold that the judgment-debtor appellant is not precluded from contending that mesne profits could not be awarded for a period exceeding three years from the date of the decree.

We may now consider the question from another aspect. Rule 12, Order 20 Civil Procedure Code requires the Court to direct, at the time of passing the preliminary decree, an inquiry as to mesne profits from the institution of the suit until the actual delivery of possession of the property to the decree-holder or until the expiration of three years from the date of the decree whichever event first occurs. The Court at the time of the passing of the decree is not in a position to say which of the three events mentioned in clause (c) of sub-rule (1) or rule 12 will determine the period for which mesne profits would be payable to the decree-holder. Either, therefore, the Court has to repeat the various alternatives mentioned in this clause in the judgment and the decree which is to follow the judgment or the judgment and the decree for mesne profits is to be construed in accordance with these provisions. It is preferable to construe it in this way rather than to insist that the Court should mechanically repeat in the judgment and decree the various provisions of clause (c). It may sometimes even happen that the enquiry into mesne profits is completed before the expiry of 3 years and that the final decree follows in due course while in fact no possession had been delivered by then. It would not be possible for the judgment-debtor to contend at that time that the decree has not been properly prepared and that it should state that in case possession is not delivered within the period of three years, mesne profits would be payable only for the period of three years from the date of the decree. It does not appear to be desirable that the passing of the final decree be put off till either possession is delivered or a period of three years had expired from the date of the decree.

Lastly, we may draw attention to a possibility of the decree-holder gaining by his own default, if he did not take possession for a period longer than 3 years after the date of the decree, when the decree did not specify the period for which mesne profits would be allowed or merely stated that mesne profits would be paid until delivery of possession. The law did not contemplate such a case and therefore clearly provided the maximum period for which mesne profits would be allowed to the decree-holder after the passing of the decree. Such a case was *Kunwar Jagdish Chandra v. Bulagi Das*¹.

We therefore hold that a decree under rule 12, Order 20, Civil Procedure Code directing enquiry into the mesne profits, however expressed, must be construed to be a decree directing the enquiry into the mesne profits in conformity with the requirements of rule 12 (1) (c) of Order 20 and that the decree-holder in this case cannot get mesne profits for the period subsequent to 7th March, 1941 when the three-year period from the date of the High Court decree expired.

The other question urged for the appellant is that the High Court was in error in arbitrarily fixing a higher amount of mesne profits than what had been adjudged by the trial Court which had itself arbitrarily increased the mesne profits suggested by the Commissioner. It was urged for the respondent decree-holder that even if the High Court had not given any reason for fixing the rate of mesne profits at a higher rate than the rate fixed by the trial Court, it must be presumed that the High Court had fixed the higher rate after considering the material on record and that therefore it cannot be said that the High Court had fixed mesne profits arbitrarily.

It is therefore first necessary to consider whether the High Court had given good reasons for decreeing mesne profits at a higher rate than that fixed by the trial Court. We are of opinion that the High Court had not really come to grips with the question of proper mesne profits and that it varied the rates in most cases, without expressing its reasons for holding that the Subordinate Judge was wrong in his findings regarding the quantum of mesne profits. This is clear from certain circumstances. The first is that the High Court overlooked the period of depression in considering the quantum of mesne profits.

The Commissioner divided the period of 17 years from September, 1926 to March, 1943 into three periods, viz., 1926 to 1930, 1931 to 1940 and 1941 to 1943. The middle period between the years 1931 and 1940 was a period of depression and

the last period was one in which prices of commodities had risen to some extent on account of World War II. In view of these considerations, the Commissioner fixed the rate of profits from land differently for each period.

The trial Court fixed at first a normal rate, *i.e.*, a rate which was considered adequate for the first and the last period, then made allowance for the period of depression and calculated mesne profits at a lower rate for the ten years between 1931 and 1940. The High Court appears to have missed noticing the fact of the trial Court calculating mesne profits at a lower rate for the period of ten years. It fixed one rate for the period 1926 to 1940 and another rate for the period 1941 to 1943, and thus overlooked the long period of depression. It is on this account that the mesne profits ordered by the High Court are very much higher than what were fixed by the trial Court. If this fact had not been ignored, the difference between the two amounts would not have been so much and might have been in the neighbourhood of Rs. 2,000 plus a corresponding increase in the amount or interest. The High Court appears to have missed this point as it was considered by the learned Subordinate Judge practically at the end of his judgment, at para. 25. Below is given the Table showing reduced rates of profits allowed by the Subordinate Judge for the period 1931 to 1940:

S. No	Item of Schedule	Profit allowed per acre by Sub-Judge for periods 1926-30 & 1941-43	Profit allowed per acre by Sub-Judge for period 1931-40
1	1, 4, 8, 12 of A Schedule & C Schedule	Rs. 35	Rs. 25
2	9 of A Schedule	Rs. 50 (for garden produce)	Rs. 40 (for garden produce)
3	10, 11 of do.	Rs. 10	Rs 7-8-0
4	18 to 20 of do.	Rs 30	Rs 20
5	Rest of items of A Schedule, <i>viz.</i> , 2, 3, 5, 6, 7 & 13 to 17		No change

The second is that the High Court ordered profits at a rate higher than what was even claimed by the decree-holder in regard to item No. 9 of the A Schedule properties. The trial Court fixed the annual profits at Rs. 50. The High Court said :

"We are inclined to think that it is too low. We enhance the amount to Rs. 100 per year up to 1940 and to Rs. 150 for the years 1941, to 1943."

The Commissioner's report shows that the plaintiff claimed mesne profits for the mango grove at Rs. 150 per acre up to 1940 and later at Rs. 200 per acre, and thus claimed about Rs. 94 a year up to 1940 and about Rs. 126 a year for the later period, the area of the item being .63 cents. The High Court could not be justified to award the mesne profits higher than what are claimed by the decree-holder.

The third is that the finding of the High Court is not consistent with its reasoning with respect to items Nos. 10 and 11 which were pasture lands. The Commissioner suggested mesne profits at Rs. 10 per acre and said that tax on item No. 10 was at Rs. 6 per acre and on item No. 11 at Rs. 5 per acre. The Subordinate Judge fixed mesne profits at Rs. 10 for the .95 acres in area and the proper tax for these items at Re. 1. The High Court raised the rate of mesne profits to Rs. 20 for the period up to 1940 and Rs. 30 for the subsequent period; but confirmed the finding about the amount of tax. In making this order the High Court seems to have been under some confusion, for, the basis of its increasing the profits seemed to be the fact that the tax on these items was Rs. 5 as it said :

"He (the Subordinate Judge) confirmed the finding of the Commissioner in this behalf. The Commissioner gives no reasons as to how he fixed the profits at Rs. 10 for the items. It is stated that

the tax paid on the land is Rs. 5. We are inclined to think that it would be proper to fix Rs. 20 for the items up to 1940 and Rs. 30 for 1941 to 1943. The tax of Re. 1 deducted by the Subordinate Judge is confirmed."

The basis for raising the amount of mesne profits vanishes, when the High Court finally agrees with the Subordinate Judge that the tax would be Re. 1.

Another consideration is that the Subordinate Judge calculated mesne profits for item No. 12, consisting of dry land, at Rs. 35 per acre. The High Court enhanced the amount to Rs. 50 per acre, probably thinking that garden crops could be raised on this land as it said :

"The learned Subordinate Judge stated in paragraph 18 that garden crops could be grown on the surrounding lands."

This is not a very precise summing up of what the Subordinate Judge had said in para. 18 of his judgment. He stated there that the Commissioner had fixed profits for this item at Rs. 30 per acre per year as in the case of other dry lands and that he was fixing profits at Rs. 35 per acre as he had done so in respect of other dry lands. He however referred to the observation of the Commissioner :

"He observes that there is evidence to show that on the surrounding lands, garden crops were being raised and that there is no reason to hold that no such crops were raised on this item."

The Subordinate Judge did not fix the rate on the basis that garden crops could be raised or were raised on the land of item No. 12 and fixed the rate on the basis that it was dry land. The Commissioner too does not appear to have fixed the rate on the basis that garden crops could be raised on this land.

We may now consider how the High Court dealt with the various items of property in A and C Schedules to show that the variations made by it in the rates were not based on any basic material on the record. We refer to them in the order in which they were dealt with by the High Court.

Schedule A:—

Items Nos. 13 to 17.—The Subordinate Judge fixed the rent of these houses at Rs. 4 a month. The High Court raised it to Rs. 6 per month merely stating :

"We are inclined to think that the rent of Rs. 6 per month might be fixed in regard to these items"

The reasons given by the Subordinate Judge for fixing the monthly rent at Rs. 4 are, in his own words :

"The Commissioner has however fixed the mesne profits for these items at Rs. 2 per month. The Union tax itself on this house appears to be Rs. 6-4-0 per year. The annual tax is generally equivalent to about 2 months' rent. The tax may be taken as a fairly correct basis for fixing the mesne profits. In that case, the rate fixed by the Commissioner is too low and I would fix the profits for these items at Rs. 4 per month."

Items Nos. 1, 4 and 8.—The Subordinate Judge fixed the actual profits for the land comprised in these items at Rs. 35 per acre. His reasons were :

"It is seen from the evidence of R W. 26 that the prices of land and maktas rose about 10 years after Chhina Bapanna's death which took place in 1915. If this statement were to be taken as correct and if, according to Exhibits P-10 and P-11, the rent realised by dry lands works out to Rs. 30 per acre, it cannot be said to be unreasonable or excessive to fix the profits on these dry lands at Rs. 35 per acre from 1925 onwards. It may also be remembered that prices rose after the close of the 1918 war. The Commissioner has fixed it at the rate of Rs. 30 only. I would however fix the profits on these dry lands at Rs. 35 per acre per year and the petitioner would be entitled to profits at this rate on items 1 and 4 also from 1926."

The High Court reduced the rate of profits to Rs. 30 per acre for the period up to 1940 and raised it to Rs. 60 per year for the period 1941 to 1943 and stated, in this connection :

"The learned Subordinate Judge increased the rent from Rs. 30 to Rs. 35 without giving any reasons. We are inclined to hold that in respect of all these three items, the rate ought to have been fixed at Rs. 30 per year up to 1940. After 1940 there was an increase in prices. We are inclined to hold that for all these three items the rate might be fixed at Rs. 60 per year for the period 1941 to 1943."

The High Court was in error in noting that the Subordinate Judge had given no reasons for raising the rate recommended by the Commissioner. It is really the

High Court which gave no reason for lowering the rate upto 1940 and doubling the rate from 1941 onwards.

Items Nos. 9, 10, 11 and 12.—We have already dealt with items 9, 10, 11 and 12 and shown how the High Court had gone wrong in increasing the rate of profits from them.

Items Nos. 18 to 20.—The Commissioner recommended profits at the rate of Rs. 30 a year. The Subordinate Judge agreed with him and so did the High Court, for the period upto 1940. It however raised the rate to Rs. 60 a year from 1941 onward stating simply :—

“But, so far as the years 1941 to 1943 are concerned, we think it would be reasonable to fix the rate at Rs. 60 per acre.”

Items Nos. 2, 3, 5, 6 and 7.—The High Court confirmed the findings of the Subordinate Judge with respect to the profits for the period upto 1940 but fixed the rate per bag at Rs. 10 for the period subsequent to 1941 stating :

“However, for the years 1941 to 1943, we fix the rate per bag at Rs. 10-0-0 as the prices had increased after 1940.”

Schedule C.

The Commissioner allowed profits at Rs. 30 per acre as in the case of dry lands. The Subordinate Judge fixed profits at Rs. 35 for the same reason as he had fixed that rate for dry lands of items 1.4 and 8 of Schedule A. The High Court reduced the rate to Rs. 30 relying on leases Exhibits P-10 and P-11 of 1915. It ignored the statement of R.W. 26 considered by the Subordinate Judge, that rents increased from 1925.

In view of what we have said above, we are unable to say that the High Court was right in considering the rates of profits fixed by the Subordinate Judge to be wrong and in increasing the rate of profits for most of the items of Schedules A and C and especially, for the period between 1926 and 1940.

Two courses are now open for us. One is to set aside the decree for mesne profits and send back the case to the Court below for deciding it with respect to the quantum of mesne profits. The other is to set aside the decree of the High Court and restore that of the Subordinate Judge with respect to the quantum of mesne profits upto 7th March, 1941, in view of the facts that the mesne profits awarded against the appellant are for the period between 1926 and 1943 and that any further enquiry about mesne profits would further put off a final decree for mesne profits. In view of such a consideration, learned Counsel for the appellant had expressed, without prejudice, his client's agreeing to the calculation of mesne profits at the rate determined by the trial Court and, consequently, to the decree for mesne profits passed by that Court, but the learned Counsel for the decree-holder respondent had stated that his client would prefer a fresh decision of the High Court on the point in case this Court found that the High Court was not justified to raise the amount of mesne profits. The respondent is more interested in the early finalisation of the mesne profits than the appellant and so we would order in conformity with his wishes.

We therefore allow the appeal with costs of this Court, set aside the decree of the Court below and remand the case to the High Court to determine afresh the quantum of mesne profits upto 7th March, 1941, when the three years from the decree of the High Court expired and to dispose of the appeal according to law.

Mudholkar, J.—This is an appeal from the judgment of the High Court of Andhra Pradesh which arose out of a suit for possession and mesne profits instituted in the year 1926. The suit was dismissed by the trial Court but on appeal the High Court of Madras passed a decree therein in favour of the second plaintiff who is the first respondent before us, on 7th March, 1938. The decree which the High Court passed, in so far as mesne profits were concerned, was a preliminary decree and therein the High Court made the following provision with respect to the claim for mesne profits :

"that the lower Court do make an enquiry as to the mesne profits from the date of the institution of the suit and pass a final decree for payment of the amount that may be found due upto the date of delivery of possession to the second plaintiff."

No further appeal was taken by the first respondent, who is the appellant before us, against whom the decree was passed.

Respondent No. 1 obtained delivery of possession of some property with respect to which his claim had succeeded in the year 1943 and of another item of property on 15th January, 1948.

On an application preferred by respondent No. 1 a Commissioner was appointed by the Court of first instance for making an enquiry into mesne profits. After considering that report the Court passed final decree for a certain amount in favour of respondent No. 1. In the course of the judgment it observed :

"So far as the A and C schedule properties are concerned, there is no dispute about the mesne profits in regard to their having to be ascertained for a period of 17 years, i.e., from 1926 to 1943 February and for the mesne profits in regard to the B Schedule properties being ascertained till 1946. The contest is only in regard to the quantum and not to the periods mentioned above."

The appellant preferred an appeal from the final decree before the High Court of Madras which was eventually transferred to the High Court of Andhra Pradesh. The appellant, however, did not raise any ground in his memo. of appeal to the effect that mesne profits could not be awarded for a period in excess of three years from the passing of the preliminary decree. He had not raised this question either in his counter affidavit in answer to the application made by respondent No. 1 for the appointment of a Commissioner for determining mesne profits nor had he raised it before the Commissioner. On the other hand it was conceded before the Commissioner, as also the Subordinate Judge, that accounts can be taken up to the year 1943 in respect of the properties described in Schedules A and C to the plaint and up to 1946 in respect of properties described in Schedule B to the plaint. For the first time, however, when the appeal was argued before the High Court of Andhra Pradesh the appellant raised the contention that by virtue of the provisions of Order 20, rule 12 the respondent No. 1 was entitled to the award of mesne profits beyond three years from the date of the preliminary decree. In regard to this objection the High Court observed :

"As the appellant raised no dispute and elected to have the profits determined by the Subordinate Judge up to the date of delivery of possession we are not inclined to permit the appellant to raise this new ground of appeal."

However, as the decision of the High Court was open to further appeal it heard the parties on the new ground raised by the appellant and decided it against him. Along with the appeal the High Court dealt with the cross-objection preferred by the first respondent in which he claimed enhancement of the amount of mesne profits. The High Court dismissed the appellant's appeal and partially allowed the cross-objection preferred by the first respondent and modified the final decree passed by the Court. Eventually the High Court granted a certificate to the appellant and that is how the matter has come up before us.

Two points were urged on behalf of the appellant before this Court. The first is that respondent No. 1 was not entitled to be granted mesne profits for a period beyond three years from the passing of the preliminary decree and the other is that the High Court was in error in enhancing the amount of mesne profits. Along with this appeal we have also heard an appeal preferred by the respondent which is C.A. No. 926 of 1963 in which he claimed a further enhancement of the amount of mesne profits.

I have had the advantage of reading the judgment of my learned brother Raghubar Dayal in which he has held that the High Court was in error in refusing leave to the appellant to raise a new ground at the stage of argument and after allowing it to be raised has upheld it. In regard to the second ground he has observed that the High Court was not right in raising the amount of mesne profits and has expressed the opinion that the matter be remanded to the High Court for fresh decision on the point. He has also expressed the view that the cross-appeal preferred by the respondent should be dismissed.

I am clearly of the opinion that the High Court was right in refusing leave to the appellant to raise a new ground at the hearing since not only had he not raised it in the memo. of appeal but he had also allowed an enquiry into mesne profits by the Commissioner to be made, for a period longer than three years from the date of the decree and participated therein. The reason why a new ground ought not to be allowed to be raised at the hearing of an appeal has been so well stated by Lord Birkenhead in *Wilson v. United Counties Bank Ltd.*¹, that I need do no more than reproduce what he has said :

"The object of indicating in detail the grounds of appeal, both to the Court of Appeal and to your Lordships' House, is that the respondent parties may be accurately and precisely informed of the case which they have to meet. Their efforts are naturally directed to the contentions which are put forward by the appellants. *They are entitled to treat as abandoned contentions which are not set forth.* If in exceptional cases parties desire to add new grounds to those of which they have given notice, it will usually be convenient, by a substantive application, to apply to the indulgence of the Court which is to hear the appeal. In the present case, both in the Court of Appeal and before your Lordships, entirely new contentions have been submitted on behalf of the defendants. The practice is extremely inconvenient and ought in my judgment to be discouraged in every possible way." (*Italicised words are mine.*)

Further, we cannot lose sight of the fact that the grant or refusal of permission to raise a new ground was within the discretion of the High Court. The High Court has given very good and cogent reasons for refusing permission to the appellant to raise the new plea and not acted capriciously, as would be clear from the following passage in its judgment :

"In the original grounds of appeal, no objection was taken as to the period for which mesne profits had to be paid. Before the appeal was taken up, the appellant sought to raise an additional ground of appeal viz., that the Subordinate Judge was not entitled to grant mesne profits for more than 3 years from the date of the High Court's decree. This question was not raised in the counter-affidavit in I. A. No. 558 of 1945 on the file of the Subordinate Judge, Eluru or before the Commissioner or before the Subordinate Judge. On the other hand, it was conceded before the Commissioner as also the Subordinate Judge that accounts can be taken up to 1943 in respect of A and C schedule properties and up to 1946 in respect of B schedule properties. It is for the first time that this objection based on provisions of Order 20, rule 12 Civil Procedure Code is raised before this Court. If the objection had been raised in the counter or before the Commissioner, it would have been open to the 2nd plaintiff to file a suit for recovery of the mesne profits beyond the 3 years up to the date of delivery of possession. As the appellant raised no dispute and elected to have the profits determined by the Subordinate Judge up to the date of delivery of possession, we are not inclined to permit the appellant to raise this new ground of appeal."

We would be going against all precedents as for instance the decision of the Privy Council in *Rehmat-un-nisa Begum v. Price*², and our recent judgment in *Ittyavira Mathai v. Varkey Varkey*³, if we say that despite what the High Court did, we shall go into the question ourselves. In that case we have observed in column 2 page 911:

"It would thus be clear that the appellant has not raised sufficiently clear plea of limitation by stating relevant facts and making appropriate averments. It is apparently because of this that the trial Court, though it did raise a formal issue of limitation, gave no finding thereon. Nothing would have been simpler for the trial Court than to dismiss the suit on the ground of limitation if the plea was seriously raised before it. Had the point been pressed, it would not have been required to discuss in detail the various questions of fact pertaining to the merits of the case before it could dismiss the suit. In the plaint the respondents claimed that the period of limitation for the suit commenced on 15-2-1113 when the High Court dismissed the revision petition preferred by the respondents. The appellant has not stated that under Article 47 of the Limitation Act, the period of limitation is to be computed not from the date of the revisional order but from the date of the original order. Had he done so, we have no doubt that the respondents would at least have placed on record by amending the plaint the date on which the plaint was instituted in the Court of the Munsiff. Thus had the plaint been instituted in the Court of the Munsiff say two months before the expiry of the limitation, the suit would have been within time on 4-3-1118 when the plaint was represented to the District Court, computing the period of limitation even from the date of the original order. Moreover, the appellants could well have raised the question of limitation in the High Court in support of the decree which had been passed in their favour by the trial Court. Had they done so, the High Court would have looked into the records before it for satisfying itself whether the suit was within time or not. The point now raised before us is not one purely of law but a mixed question of fact and law. No specific ground has even been taken in the petition made by the appellant before the High Court

1. L.R. (1920) A.C. 102, 106.

3. (1964) 1 S.C.R. 495 : A.I.R. 1964 S.C.

2. (1917) L.R. 45 I.A. 61 : 35 M.L.J. 262 : 907.

A.I.R. 1917 P.C. 116.

for grant of a certificate on the ground that the suit was barred by time. In the circumstances we decline leave to the appellant to raise the point of limitation before us."

We refused permission to the appellant to raise a new ground for two independent reasons. One was that the appellant had not raised a sufficiently clear plea in his written statement. The other was that the question was a mixed one of fact and law.

I am aware that in *Teshwant Deorao Deshmukh v. Walchand Ramchand Kothari*¹, this Court has quoted with approval at pages 861-2 the following passage from the decision in *Connecticut Fire Insurance Co. v. Kavanagh*²:

"When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below."

But there a question of limitation had in fact been raised in the Court below and what was sought by the appellant was leave to press in aid section 18 of the Limitation Act. It was in this connection that the observations quoted earlier were referred by this Court. Moreover, since this Court negatived the plea based on section 18 on the ground that the necessary facts were not established the approval of Lord Watson's view could at best be said to be a *mère obiter*.

We must also not lose sight of the principle that where a party omits to raise an objection to a direction given by the lower Court in its judgment he must be deemed to have waived his right and he cannot, for the first time at the hearing of an appeal from the decision of that Court challenge its power to make the direction. In *London Chatham and Dover Railway Co. v. South-Eastern Railway Co.*³ all the Lord Justices of the Court of Appeal have emphatically said that an omission of a kind of which the appellant in this case is guilty must be treated as a waiver even of a plea of jurisdiction. In that case there was an agreement between the parties, two railway companies, which provided for a reference of all matters of difference between them to arbitration under the Railway Companies Arbitration Act. Section 26 of the Act required the Court where one of the parties to the agreement insisted upon it, to give effect to and to act in accordance with the agreement, so far as the submission to arbitration was concerned. The defendant pleaded the arbitration agreement in defence while the plaintiff challenged its validity. A question was raised by the defendant about the competency of the Court to adjudicate upon the validity of the agreement. The trial judge held in favour of the plaintiff and his decision was upheld by the Court of Appeal. The defendant took the matter to the House of Lords and while the appeal was pending there the case came up before Kekewich, J. One of the questions in the appeal was whether, if the agreement was a good one, jurisdiction of the Court was ousted. The defendant made an application for postponement of the action because certain other points decided by the Court of Appeal which had gone to the House of Lords would be material. But the defendant did not say in the application that the question about the jurisdiction of the Court was also before the House of Lords and that for this reason it ought not to be put to the trial of the action till it was finally decided. The trial then proceeded and judgment was given on the basis of the evidence. When the matter went to the Court of Appeal the defendant contended that the Court had no jurisdiction to go into the merits of the case. Negating it, Cotton, L.J., said:

".....the defendants did not say, 'while the decision in the House of Lords is pending we cannot contend that this point ought to go to an arbitrator, but we do not abandon it, we still desire to keep it open'; but they go on with the trial and they get the judgment of a Court upon the evidence on the question which they now say the Court ought never to have entertained. In my opinion parties ought not to be allowed to do that. If when they can insist on the Court not going into the merits of the case and deciding questions between the parties, they abstain from doing so, and are

1. (1951) 5 C J 19 : (1950) S C R. 852 : A.I. R. 1951 S.C. 16

2. L R. (1892) A C. 473.

3. (1889) 40 Ch. D. 100 at p. 106-109.

defeated on the merits, in my opinion it is too late to insist before the Court of Appeal on any right to object the jurisdiction of the Court which they might have had if they had insisted on it in a proper way and at a proper time." (p. 105)

Lindley L.J., observed :

"Having regard to the course which was adopted in the Court below, I think the defendants must be treated as having waived this objection in the Court below, and it would not be right for us to entertain it on appeal." (p. 107)

Bowen L.J., agreeing with the other Lords Justices said :

"I agree with the Lord Justice that here, if the point had been taken and insisted upon from the first, there might have been no answer to it ; but, at all events, when the point is not taken from the first, it is to be treated as having been abandoned in that way ; and when a point such as this is waived and not insisted upon, the Court is not compelled at any stage of the litigation to go back and treat the parties who have waived it as parties who have not done so."

This is not an isolated decision, nor indeed does it lay down a novel rule of practice. It is right and proper that parties to a litigation should not be permitted to set up the grounds of their claims or defence in dribbles or at different stages and embarrass the opponents. Considerations of public policy require that a successful party should not, at the appellate stage, be faced with new grounds of attack after having repulsed the original ones. The proper function of an appellate Court is to correct an error in the judgment or proceedings of the Court below and not to adjudicate upon a different kind of dispute—a dispute that was never taken before the Court below. It is only in exceptional cases that the appellate Court may in its discretion allow a new point, to be raised before it provided there are good grounds for allowing it to be raised and no prejudice is caused thereby to the opponent of the party permitted to raise such point. But where the appellate Court in exercise of its discretion refuses leave to a party to raise such point there is little scope for any indulgence being shown by this Court. This would suffice to dispose of the question whether mesne profits could be awarded till the date of delivery but as my learned brother has considered that question on merits, I must deal with it as well.

I regret my inability to agree with the decision of my learned brother on the merits of the first point. There is no doubt whatsoever that under Order 20, rule 12 (c) of the Code, a Court has to direct enquiry as to mesne profits from the date of institution of the suit until (i) the delivery of possession to the decree-holder ; (ii) the relinquishment of possession by the judgment-debtor and notice to the decree-holder through the Court or (iii) the expiration of three years from the date of the decree, whichever event occurs first. Therefore, when the Madras High Court passed a preliminary decree on 7th March, 1938, it ought to have given directions with regard to the determination of mesne profits in the manner provided for in clause (c) of rule 12 (1) of Order 20, Civil Procedure Code. The High Court, however, chose to make only a single direction and that is that mesne profits be determined upto the date of the delivery of possession and nothing more. It may be that the High Court did not expect that the delivery of possession would be delayed beyond three years of the passing of the decree or that the High Court overlooked the possibility of possession being delivered more than three years after its decree. Therefore, it does not necessarily follow that the failure of the High Court to make it clear that in any case the determination of mesne profits shall not be for a period in excess of three years from the date of preliminary decree was an error. Even assuming that the direction in the preliminary decree that mesne profits shall be determined and consequently will be payable right up to the date of delivery of possession, whenever the event occurred, was wrong that decision has to be given effect to. This decree, as already pointed out, was not challenged by taking a further appeal and has, as between the parties, become final by the operation of the provisions of section 97 of the Code of Civil Procedure which says :

"Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

The appeal before us is an appeal from the final decree and, therefore, the appellant is precluded from making a challenge to a direction in the preliminary

decree. I am fortified in this view not only by what we have said in *Ittyavira Mathai's case*¹, in para. 8 at page 910 but also by the recent judgment of this Court in *Smt. Gyarsi Bai and others v. Dhansukh Lal and others*². There, Subba Rao, J., speaking for the unanimous Court has observed :

"In a case where a decree is made in Form No. 5-A, it is the duty of the Court to ascertain the amount due to the mortgagee at the date of the preliminary decree. How can the amount due to the mortgagee as on the date of preliminary decree be declared unless the net profits realized by him from the mortgaged property are debited against him? The statutory liability of the mortgagee to account up to the date of the preliminary decree would be the subject-matter of dispute in the suit up to the date of the said decree. The Court has to ascertain the amount due under the mortgage in terms of the mortgage deed and deduct the net realizations in the manner prescribed in section 76 (h) of the Transfer of Property Act and ascertain the balance due to the mortgagee on the date of the preliminary decree. If the mortgagor did not raise the plea, he would be barred on the principle of *res judicata* from raising the same, as the said matter should be deemed to have been a matter which was directly and substantially in issue in the suit up to that stage. It is settled law that though a mortgage suit would be pending till a final decree was made, the matters decided or ought to have been decided by the preliminary decree were final. Suppose the mortgagor paid certain amounts to the mortgagee before the preliminary decree, if these were not given credit to the mortgagor and a larger amount was declared by the preliminary decree as due to the mortgagee, can the mortgage, after the preliminary decree, reopen the question? Decidedly he cannot. This is because the preliminary decree had become final in respect of the disputes that should have been raised before the preliminary decree was made."

That the general principles of *res judicata* would apply to such a 'case' as this was held long ago in *Ram Kupal Shukul v. Mussumat Rup Kuari*³, and the view taken therein has been followed by this Court in *Gulabchand Chhotalal Parikh v. The State of Bombay (now Gujarat)*⁴.

It is, however, contended that what the appellant seeks in this appeal from the final decree is merely an interpretation of a direction in the preliminary decree and that that direction should be construed in such a way as to make it a decree according to law *i.e.*, in accordance with the provisions of Order 20, rule 12, Civil Procedure Code. The question of construction of a decree can only arise where the decree is ambiguous. A number of cases were relied upon before us on behalf of the appellant and some of them have been discussed in the judgment of my learned brother as also in the judgment of the Full Bench in *Kudapa Subbanna v. Chittur Subbanna and others*⁵. That decision is the subject of the appeal preferred by respondent No. 1 in C.A. No. 926 of 1963. It may be conceded that where the meaning of a term of a decree is not clear or is ambiguous the question of construing that term would arise. In such a case the Court whose duty it is to construe it would be doing the right thing in placing upon it a construction which will make it conformable to the law. The direction in question contained in the preliminary decree of the High Court does not, in my opinion, suffer from vagueness, ambiguity or such incompleteness as will make its enforcement impossible. It may be that the High Court in making the direction wrongly thought that it had discretion to specify any of the three events set out in clause (1) (c) of rule 12 of Order 20 or that it expected that possession would be delivered by the appellant to the respondent before the expiry of three years. Or it may be that the High Court had overlooked the limitations placed upon the power of the Court by the concluding part of clause (c) of Order 20, rule 12 (1). But whether it was one or the other, does not render the direction in question vague, ambiguous or incomplete. In order to ascertain whether a particular term or direction in a decree is clear and complete or vague and ambiguous the Court must ordinarily confine its attention to the direction itself. It will be justified in looking to the other provisions in the decree if there appears to be a doubt about the meaning of its terms or if any of the terms conflict with another part of the decree. But where there is no such doubt or conflict the occasion to look at the other terms of the decree cannot arise. It is however, not the suggestion of Mr. Viswanatha Sastri that this particular term is inconsistent with any of the other

1. (1964) 1 S.C.R. 495. A.I.R. 1964 S.C. 907.

2. A.I.R. 1965 S.C. 1055.

3. L.R. (1883) 11 I.A. 37.

4. (1965) 2 S.C.J. 58 : A.I.R. 1965 S.C. 1154.

5. (1962) 2 An.W.R. 71 (F.B.).

terms of the decree. His argument is that if the term is taken by itself it would be in conflict with law and so we must read in it the whole of the provisions of Order 20, rule 12 (1) (c). But then the High Court has clearly selected only a portion of this provision and made that alone as a term of its decree, omitting the rest of it. The argument of learned Counsel in substance amounts only to this: that the High Court in acting in this manner committed an error of law, but mere error of law does not vitiate the direction made by the High Court. Even assuming that one of the terms of a decree is erroneous in law the decree is nonetheless binding upon the parties until and unless it is corrected in appeal or other appropriate proceeding. Such a decree cannot be treated as one which was passed without jurisdiction. For, it is well settled that while it is the duty of a Court to decide right it may well happen that it decides wrong. Whichever way it decides, it acts within its jurisdiction and not beyond it, as was observed by the Privy Council in *Malkarjun v. Narhar*¹ which was followed by this Court in *Ittyavir Mathar's case*². A wrong decision is no doubt vulnerable but it does not automatically become unenforceable. Unless corrected in the manner provided for in the Code it will operate as *res judicata* between the parties in all subsequent stages of the *lis*.

I have not thought it necessary to discuss the various decisions cited at the Bar and noted by my learned brother because the decrees, construed in them were found to be vague or incomplete. To my mind it would not be right for a Court to characterise a term of a decree which upon its face appears to be clear and complete, as being vague or incomplete merely because in its view that term is erroneous and then proceed to interpret it. So far as a Court whose duty it is to give effect to a decree of a Court of competent jurisdiction is concerned it is immaterial whether the term or direction as it stands is contrary to law. So long as it is, on its face complete and capable of enforcement it has no power to go behind. For these reasons I am of opinion that the first contention raised on behalf of the appellant must fail.

As regards the question of quantum of mesne profits I agree with my learned brother that the High Court has given no good reasons for enhancing the amount. In dealing with various items it seems to have proceeded on assumptions or raised the rates of profits to be allowed without referring to the basis for the enhancement. In the circumstances I would agree to the course proposed by him.

The appeal, therefore, succeeds only partially and in the circumstances the appropriate order for costs would be for each party to bear its costs in this Court.

ORDER OF THE COURT :—The appeal is disposed of in accordance with the majority judgment.

V.K.

Appeal allowed..

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. N. WANGHOO, M. HIDAYATULLAH, J. C. SHAH, J. R. MUDHOLKAR. AND S. M. SIKRI, JJ.

Babu and others

*.. Appellants**

v.

The State of Uttar Pradesh

.. Respondent.

Constitution of India (1950), Article 134 (1) (c)—Certificate under—When can be granted—Reference to third Judge under section 429 of Criminal Procedure Code on different of opinion of two Judges of High Court—Duty of third Judge—Omission to discuss in detail the point of difference—If a ground for granting certificate.

Criminal Trial—Offence of murder—Sentence of death—Reduction of by Supreme Court—When permissible.

Under Article 134 (1) (c) of the Constitution of India the Supreme Court has not been made an ordinary Court of Criminal Appeal and the High Courts should not by the certificates attempt to create a jurisdiction which was not intended. The High Courts should, therefore, exercise their dis-

1. (1906) 10 M.L.J. 368 : L.R. 27 I.A. 216. 907.

2. (1964) 1 S.C.R. 495 : A.I.R. 1964 S.C.

* CrI. A. No. 179 of 1964.

cretion sparingly and with care. Article 134 (1) (c) does not confer an unlimited jurisdiction on the High Courts. The power gives a discretion but discretion must always be exercised on some judicial principles. A similar clause in Article 133 which allows appeals in civil cases, has been consistently interpreted as including only those cases which involve a question of general public importance. That test need not necessarily be applied to a criminal case but it is clear that mere questions of fact should not be referred for decision. The constitution does not contemplate a criminal jurisdiction for the Supreme Court except in those two cases covered by clauses (a) and (b) of Article 134 (1) which provide for appeals as of right. The High Court before it certifies the case must be satisfied that it involves some substantial question of law or principle. In a criminal appeal the High Court can consider the case on law and fact and if the High Court entertains doubt about the guilt of the accused it can always give the benefit to accused. It is not necessary that the High Court should first convict him and then grant him a certificate. Thus only a case involving something more than mere appreciation of evidence is contemplated by the Constitution for the grant of a certificate. What that may be will depend on the circumstances of the case but the High Court should be slow to certify cases. It should not overlook that there is a further remedy by way of Special Leave which may be invoked in cases where the certificate is refused.

Where two Judges of the High Court differed on appreciation of evidence during the disposal of a criminal appeal, the main point of difference being over the authenticity of the First Information Report, and the matter was laid before a third Judge under section 429 of the Criminal Procedure Code (V of 1898) who accepted the evidence against the accused stating at the same time that it was not necessary for him to decide about the authenticity of the First Information Report but that if it was necessary he would agree with what all the Judge who held that the First Information Report was genuine had said and thereafter the High Court granted a certificate under Article 134 (1) (c) :

Held, the certificate did not comply with the requirements of Article 134 (1) (c) and hence was incompetent.

After the decision of the third Judge accepting the evidence against the accused no question of fact survived. Section 429 of the Criminal Procedure Code contemplates that it is for the third Judge to decide on what points he shall hear arguments and that postulates that he is completely free in resolving the difference as he thinks fit and so the third Judge in the instant case was within his right in stating that it was not necessary to decide about the genuineness of the First Information Report and that if it was he agreed with the Judge who held that it was genuine. The omission on the part of the third Judge to discuss in detail the First Information Report and the doubts about it could not therefore be a ground for granting a certificate under Article 134 (1) (c).

Held further : The case was not even fit for the grant of Special Leave under Article 136 (1) of the Constitution of India

A sentence of death passed by the High Court in appeal cannot be reduced by the Supreme Court to one of imprisonment for life merely because a long time had elapsed after the passing of the sentence or merely because one of the Judges of the High Courts was in favour of acquitting the accused. Each case must be decided on its own facts and a sentence of imprisonment can only be substituted if the facts justify that the extreme penalty should not be imposed.

Appeal from the Judgment and Order, dated the 21st August, 1963, of the Allahabad High Court in Criminal Appeals Nos. 2271 and 2272 of 1962.

Nur-ud-din Ahmad and *J. P. Goyal*, Advocates, for Appellants.

O. P. Rana, for the Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—This is an appeal by certificate against the judgment of the High Court of Allahabad dated 24th May, 1963, by which the conviction of and sentences passed on the four appellants under section 302 read with section 34 of the Indian Penal Code were confirmed. Of the appellants, Babu Singh and Aram Singh have been sentenced to death and Gajram Singh and Ram Singh to imprisonment for life. The charge against them was that they had murdered one Babu Singh pradhan at village Behjoi on 11th October, 1961. The pradhan was attacked by the appellants with spears *gandasa* and *lathi*. The spears were with Aram Singh and Ram Singh, the *gandasa* with Babu Singh and the *lathi* with Gajram Singh. The motive for the attack was said to be some former quarrels between Babu Singh pradhan and father of Babu Singh, the appellant and the action of the pradhan

after his election in supporting on behalf of the *Gaon Samaj* proceedings for encroachment started against the fathers of the appellants sentenced to death.

On the day of occurrence Babu Singh Pradhan had gone on cycle to Behjoi to negotiate for the purchase of a Persian wheel. He had his cycle repaired by one Amrik Singh who was examined as a Court witness. He was returning to his own village Alpur situated to the north-east of Behjoi at a distance of four miles when he was waylaid, fell from the cycle and fatally attacked by the appellant. The report of the incident was made by his brother Sangram Singh at Behjoi Police Station at 8-30 P.M. Sangram Singh claimed to have accompanied his brother to Behjoi and to be in his company at the time of the assault. He was the principal eye-witness in the case. He gave the time of the assault as 6 P.M. The First Information Report also mentioned the names of Man Sukh (P.W. 9), Ved Ram (P.W. 4) and Jai Lal (P.W. 11) as eye-witnesses. In the report one Umrao was also named but he was not examined as it was alleged that he had been won over by the defence.

The prosecution examined 16 witnesses in support of the case. Two witnesses were examined by the Court and 4 witnesses were examined for the defence. The Sessions Judge, Moradabad, accepted the evidence of enmity and also of the eye-witnesses and convicting the appellants under section 302/34, Indian Penal Code, sentenced them as above. Aram Singh who had struck Babu Singh Pradhan on the head and transfixed it with his spear from temple to temple and caused other injuries on vital organs was sentenced to death as also Babu Singh who had almost decapitated Babu Singh Pradhan with the *gandasa*. The other two appellants were given the lesser punishment because they had played a minor part. All accused appealed to the High Court.

The appeal was heard in the High Court by D. S. Mathur and Gyanendra Kumar, JJ., and Mathur, J., was for dismissing the appeal while Gyanendra Kumar, J., was for allowing it. The points of difference were (a) whether the First Information Report was made on 11th October, 1961 at 8-30 P.M. or much later, (b) whether the offence took place at 6 P.M. or later when there was no light to identify the assailants and (c) whether the eye-witnesses were at all present at the scene and/or were reliable. Mathur, J., concurred with all the conclusions of the Sessions Judge; Gyanendra Kumar, J., differed because he disbelieved that Sangram Singh had accompanied his brother. His reasons were that he need not have accompanied the Pradhan and the shop-keeper with whom the brothers were said to have dealt for the purchase of the Persian wheel was not examined and Amrik Singh who repaired the cycle of the Pradhan did not mention Sangram Singh. He observed that if Sangram was present at the scene he too would have been slain and the statement that he was pedalling 14 or 15 paces behind the Pradhan was not believable because cyclists generally ride abreast. He pointed out that as only one cycle was found at the spot and not the other Sangram Singh had not gone there on cycle. He deduced this from the fact that Sangram Singh admitted to have gone on foot to Behjoi to make his report and he rejected his explanation that he did so because the cycle had no light observing that Sangram Singh could have borrowed an electric torch or some other light. He disbelieved Ved Ram because he had earlier spoken of *lathi* blows and no injuries caused by a *lathi* were detected at the *post-mortem* examination. One of the accused (Ram Singh) had passed a decree against Ved Ram as a *Sarpanch* and this was accepted to be the probable motive for his false testimony. Man Sukh was not believed because he was a previous "history sheeter." Jia Lal, who had stated that the occurrence took place at 7 P.M. and was consequently declared hostile by the prosecution, was believed by the learned Judge who came to the conclusion that no light was available at that hour for proper identification. The learned Judge was also convinced that there was a delay in the despatch of the copy of the First Information Report, special report and the Case Diary, and he was of the opinion that the First Information did not accompany the requisition for *post-mortem* examination sent to the doctor. He was finally of the view that as no independent eye-witness was examined the benefit of the doubt must be given to the accused.

The two judgments were then laid before Takru, J., who agreed with Mathur, J., in accepting the prosecution case. As a result of his decision the appeals were dismissed. On the application for certificate of fitness the two learned Judges, who had originally heard the appeal, again differed. Mathur, J., was in favour of refusing the certificate while Gyanendra Kumar, J., was for granting it. The latter stated that the main point of difference earlier was over the authenticity of the First Information Report, its time and date and Takru, J., had merely stated at the end of his order that if it was necessary for him to decide the point he would have agreed with Mathur, J., and would have accepted the First Information Report as genuine. Gyanendra Kumar, J., felt considerably aggrieved, as it appears from his order, that this matter which was fully argued before Takru, J., was not discussed by him in detail. The papers were laid before Broome, J., who agreed with Gyanendra Kumar, J., on the point that Takru, J., had not gone into the question of the authenticity of the First Information Report and the genuineness of the various documents which were filed by the prosecution in support of it. He was for granting a certificate.

When this appeal came on for hearing before a Divisional Bench the State raised the contention that the certificate granted by the High Court was incompetent in view of the settled view of this Court in *Haripada Dey v. The State of West Bengal and another*¹, *Nar Singh and another v. The State of Uttar Pradesh*² and *Sunder Singh v. State of Uttar Pradesh*³. The appellants then objected that the point involved was one of interpretation of Article 134 (1) (c) of the Constitution and it could only have been decided by a Bench of five Judges and the decisions above-mentioned being of Divisional Benches were without jurisdiction. The case was accordingly laid before us for disposal. Before us the same objection to the competency of the appeal was raised and it was contended on the other side that the decisions of this Court limiting the powers of the High Court to grant certificate in criminal cases under Article 134 (1) (c) were not correct and it is these points which require decision from us.

There seems to be some misapprehension about the manner in which the third Judge is required by law to proceed when there is a difference of opinion between two learned Judges in the High Court in the decision of an appeal. The provisions of section 429, Criminal Procedure Code, perhaps escaped notice in the High Court. This section provides :

"429. *Procedure where Judges of Court of Appeal are equally divided.*—When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion."

The section contemplates that it is for the third Judge to decide on what points he shall hear arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit. In our judgment, it was sufficient for Takru, J., to have said on the question of the First Information Report that he did not consider it necessary to decide the point but if it was necessary he was in agreement with all that Mathur, J., had said. There was, therefore, a proper decision by Takru, J., and the certificate could not be based upon the omission to discuss the First Information Report and the doubts about it.

It was contended by the State that the certificate attempted to re-open questions of fact which must be held to be decided finally by the High Court in concurrence with the Sessions Judge and such a certificate was incompetent in view of the decisions of this Court earlier mentioned. Reference was also made to *Kushalrao v. State of Bombay*⁴. The appellants in reply contended that the interpretation put upon Article 134 (1) (c) in the earlier cases of this Court was too narrow and required to be reconsidered.

1. (1956) S.C.R. 639.

2. (1954) S.C.J. 570 : (1955) 1 S.C.R. 238.
(1954) 2 M.L.J. 122 : A.I.R. 1954 S.C. 457.

3. A.I.R. 1956 S.C. 411.

4. (1958) S.C.J. 198 : (1958) S.C.R. 552 :
(1958) M.L.J. (Cr.) 100 : A.I.R. 1958 S.C. 22-

Article 134 provides for appeals to the Supreme Court in criminal matters. Clause (1) of this Article, which alone is material, reads :

"134. *Appellate jurisdiction of Supreme Court in regard to criminal matters*—(1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death ; or

(b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death ; or

(c) certifies that the case is a fit one for appeal to the Supreme Court :

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of Article 145 and to such conditions as the High Court may establish or require.

(2)

The first two sub-clauses deal with special situations and provide for an appeal as of right and they need not be considered. The third sub-clause permits an appeal in cases which the High Court certifies as fit for appeal. The sub-clause does not state the conditions necessary for such certification. No rules under Article 145, regulating generally the practice and procedure of this Court for the grant of certificate by the High Court have been framed. The power which is granted is no doubt discretionary but in view of the word "certifies" it is clear that such power must be exercised with great circumspection and only in a case which is really fit for appeal. It is impossible by a formula to indicate the precise limits of such discretion, but the question has arisen on a number of occasions in this Court and some of the leading views may be considered.

In *Haripada Dey v. The State of West Bengal and another*¹, the appellant was convicted under section 411, Indian Penal Code and sentenced to two years' rigorous imprisonment for dishonestly receiving and retaining a motor car which he had reason to believe was stolen. His appeal was dismissed by J. P. Mitter and Sisir Kumar Sen, JJ. He applied for a certificate and according to the practice of the Calcutta High Court the petition was placed not before the Judges who heard the appeal but before another Bench consisting of the Chief Justice and Lahiri, J. The Chief Justice passed an elaborate order in the course of which he observed :

"In my view a certificate of fitness ought to issue in this case, although the question involved is one of fact.

* * * * *

In my view it is impossible not to feel in this case that there has not been as full and fair a trial as ought to have been held. In the circumstances, it appears to me that the petitioner is entitled to have his case further considered and since such further consideration can only be given by the Supreme Court, I would grant the certificate prayed for."

As the Chief Justice himself said the question involved was one of fact, this Court did not approve of the certificate and held that it was no certificate at all. It was pointed out that a certificate granted in *Om Prakash v. State of U.P.*² was not accepted when no reasons were given and that the certificate in *Haripada Dey's case*¹ was also bad because the reasons were not sound, Bhagwati, J., speaking on behalf of Imam and Govinda Menon, JJ., and himself, said :

"Whatever may have been the misgivings of the learned Chief Justice in the matter of a full and fair trial not having been held we are of the opinion that he had no jurisdiction to grant a certificate under Article 134 (1) (c) in a case where admittedly in his opinion the question involved was one of fact—where in spite of a full and fair trial not having been vouchsafed to the appellant, the question was merely one of a further consideration of the case of the Appellant on facts. The mere disability of the High Court to remedy this circumstances and vouchsafe a full and fair trial could not be any justification for granting a certificate under Article 134 (1) (c) and converting this Court into a Court of Appeal on facts. No High Court has the jurisdiction to pass on mere questions of fact for further consideration by this Court under the relevant articles of the Constitution."

The observations, if we may say so with respect, are too absolute to be a safe guide in the infinite variety of cases that come before the Courts. There are cases and cases. It can only safely be said that under Article 134 (1) (c) this Court has not been made an ordinary Court of Criminal Appeal and the High Courts should

not by the certificates attempt to create a jurisdiction which was not intended. The High Courts should, therefore, exercise their discretion sparingly and with care. The certificate should not be granted to afford another hearing on facts unless there is some error of a fundamental character such as occurred in *Nar Singh's case*¹.

In *Nar Singh's case*¹, 24 persons were tried under sections 302/149, 307/149 and 148, Indian Penal Code and eight were convicted by the Court of Session. On appeal to the High Court five more were acquitted and that left Nar Singh, Roshan Singh and one Nanhu Singh. Their convictions were upheld by the High Court and their sentences were maintained. What had happened in the case of Nanhu Singh may now be stated from the judgment of this Court :

"By a curious misreading of the evidence this Nanhu Singh was mixed up with Bechan Singh. What the High Court really meant to do was to convict Bechan Singh and acquit Narhu Singh. Instead of that they acquitted Bechan Singh and convicted Nanhu Singh. As soon as the learned High Court Judges realised their mistake they communicated with the State Government and an order was thereupon passed by that Government remitting the sentence mistakenly passed on Nanhu and directing that he be released."

All the accused applied for a certificate and in view of what had happened and as the conviction of Nanhu Singh on a murder charge was still subsisting a common certificate was granted to all of them. The High Court thought that the word "case" in Article 134 (1) (c) meant the case as a whole. Nanhu Singh did not appeal and the appeal was filed by Nar Singh and Roshan Singh on the common certificate. This Court pointed out that the High Court was wrong in thinking that the word "case" in the sub-clause meant a case as a whole and the certificate in relation to accused other than Nanhu Singh was bad. The certificate to Nanhu Singh was said to be proper. The Divisional Bench then considered the case under Article 136 (1) for Special Leave but found it unfit.

In *Sunder Singh v. The State of U.P.*² it was laid down that unless a substantial question of law or principle was involved the case must not be certified as fit even though the question of fact may be difficult. *Khushal Rao's case*³ again furnishes an example of an extraordinary situation. The High Court had based a conviction for murder on dying declarations which it considered to be true but which required to be corroborated before they could be acted upon in view of the observations of this Court in *Ramnath Madho Prasad v. State of Madhya Pradesh*⁴—

"* * * it is the settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration."

The High Court found corroboration in the fact that Khushalrao was absconding for a long time and was arrested from a room which had only one exit and that was locked on the outside. When the accused applied for certificate, it was pointed out that there was some evidence which was not brought to the notice of the High Court establishing that the accused was evading arrest in another case and the circumstance that he was hiding then became dubious. The High Court felt constrained to give the certificate because under the ruling of this Court the conviction was assailable. This Court pointed out that the certificate was bad because it was not granted by the High Court on any

"difficult question of law or procedure which it thought required to be settled by this Court but on a question which is essentially one of fact, namely whether there was sufficient evidence of the guilt of the accused."

The certificate was perhaps of the type represented by the certificate to Nanhu Singh which was held proper. The matter was then considered in an elaborate judgment from the point of view of Article 136 (1) and the view about dying declaration contained in the earlier case was modified. The evidence was examined afresh and the judgment of the High Court was affirmed.

These cases illustrate different angles of the problem. There is no doubt whatever that sub-clause (c) does not confer an unlimited jurisdiction on the High Courts. The power gives a discretion but discretion must always be exercised on some

1. (1955) 1 S.C.R. 238 : (1954) S.C.J. 517. 3. (1958) S.C.R. 552 : (1958) S.C.J. 198 :
(1954) 2 M.L.J. 122 : A.I.R. 1954 S.C. 457. (1958) 1 M.L.J. (Cr.L.) 100 : A.I.R. 1951 S.C. 22.
2. A.I.R. 1956 S.C. 411. 4. A.I.R. 1953 S.C. 420.

judicial principles. A similar clause in Article 133, which allows appeals in civil cases, has been consistently interpreted as including only those cases which involve a question of general public importance. That test need not necessarily be applied to a criminal case but it is clear that mere questions of fact should not be referred for decision. The Constitution does not contemplate a criminal jurisdiction for this Court except in those two cases covered by clauses (a) and (b) which provide for appeals as of right. The High Court before it certifies the case must be satisfied that it involves some substantial question of law or principle. In a criminal appeal the High Court can consider the case on law and fact and if the High Court entertains doubt about the guilt of the accused or the sufficiency of the evidence it can always give the benefit to the accused there and then. It is not necessary that the High Court should first convict him and then grant him a certificate so that this Court, if it thought fit, reverse the decision. It is thus obvious that only a case involving something more than mere appreciation of evidence is contemplated by the Constitution for the grant of a certificate. What that may be will depend on the circumstances of the case but the High Court should be slow to certify cases. The High Court should not overlook that there is a further remedy by way of special leave which may be invoked in cases where the certificate is refused.

In this case the two learned Judges who first heard the appeal differed on appreciation of evidence. The Criminal Procedure Code contemplates the resolution of such a difference by the opinion of a third Judge. We have already drawn attention to the provisions of section 429, Criminal Procedure Code, relating to the hearing by the third Judge. It would appear to us that after the decision of the third Judge accepting the evidence against the appellants no question of fact survived. The learned Judge who heard the appeal on difference was also within his right in stating that the doubts which Gyanendra Kumar, J., felt about the genuineness of the First Information Report etc. did not affect him and that he was in agreement with what Mathur, J., had said on that part of the case. In our opinion, the certificate did not comply with the requirements of Article 134 (1) (c) as explained by us here. We have considered this case from the point of view of Article 136 (1) but we do not find it fit for the grant of Special Leave. The evidence in the case was rightly appraised by Mathur, J., and the doubts which Gyanendra Kumar, J., entertained were not justified. We do not, therefore, grant Special Leave.

It was contended that as a long time has passed the sentence of death should be substituted by imprisonment for life and reliance was placed upon *Kalawati and another v. The State of Himachal Pradesh*¹ where such action was taken. In our judgment, each case must be decided on its own facts and a sentence of imprisonment for life can only be substituted if the facts justify that the extreme penalty of the law should not be imposed. We do not consider this to be such a case.

It was next contended on the authority of *Pandurang, Tukia and Bhillia v. State of Hyderabad*² that as the two learned Judges have differed, the extreme penalty of the law should not be imposed. In the cited case the Judges had differed on the question of sentence itself and the third Judge before whom the matter was placed was in favour of the death penalty. Bose, J., in reducing the sentence to imprisonment for life, observed :

"But when appellate judges, who agree on the question of guilt differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons"

This cannot be raised to the pedestal of a rule for that would leave the sentence to the determination of one Judge to the exclusion of the other. In the present case both the Judges appear to have been in favour of the death sentence because although Gyanendra Kumar, J. was in favour of acquittal he did not object to the confirmation of the death sentence when Takru, J., had given his opinion. The offence here was brutal and normally the death penalty should follow. We, therefore, decline to reduce the sentence passed. The appeal fails and is dismissed.

V.K.

Appeal dismissed.

1. (1953) S.C.R. 546 : (1953) S.C.J. 144.

2. (1955) S.C.J. 106 : (1955) 1 S.C.R. 1083.

THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction.)

PRESENT :—RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Sahib Singh Mehra

.. Appellant*

The State of Uttar Pradesh

.. Respondent.

Penal Code (XLV of 1860), sections 499, Explanation 2 and 500—Article in the press imputing corruption in the prosecuting staff of the State—Defamatory—Sanction by Government to prosecute for remarks against the prosecuting staff of the State—Confining the complaint to the offence in regard to prosecuting staff at a particular place in the State—Not a vitiating factor—Prosecuting staff at a particular place—Identifiable group of persons—May be the subject of defamation—Duty of the press—Need to avoid reckless comments.

Sentence—Defamatory comments—Made with ulterior motives and without justification—Deterrent sentence called for.

The sanction accorded by the Government for making a complaint under section 500 of the Penal Code with respect to the impugned article extended to the defamatory remarks against the particular Assistant Public Prosecutor and also other police prosecuting staff of the Government of the State. It was competent for the Public Prosecutor in his complaint to restrict it to the defamation of that Assistant Public Prosecutor and other police prosecuting staff of the U. P. Government at Aligarh. The sanction does not suffer from any defect thereby.

Under Explanation 2, section 499 of the Penal Code there could be defamation of an individual person and also of a collection of such persons. Collection of persons must be identifiable in the sense that one could with certainty say that this group of particular place had been defamed, as distinguished from the rest of the community. The prosecuting staff of Aligarh in U. P. State or as a matter of fact the prosecuting staff in the State of U. P. is certainly such an identifiable group or collection of persons and could therefore be subject of the defamation within Explanation 2.

The impugned remarks are *per se* defamatory of the group of persons referred to. The tenor of the article does not indicate that the purpose in publishing these remarks was public good. The impugned remarks would certainly lead the readers of the article to believe or suspect that the prosecuting staff is corrupt in the discharge of its duties as Public Prosecutor and thus bound to affect the reputation of the prosecuting staff adversely. Unless proved otherwise the presumption is that every person has a good reputation. In the absence of proof that these defamatory remarks were made after due care and attention and so in good faith or made for the public good, an offence under section 500 of the Penal Code it made out.

The press has great power in impressing the minds of the people and it is essential that persons responsible for publishing anything in newspapers should take good care before publishing anything which tends to harm the reputation of a person. Reckless comments are to be avoided. When one is proved to have made defamatory comments with an ulterior motive and without the least justification motivated by self-interest, he deserves a deterrent sentence.

Appeal by Special Leave from the Judgment and Order, dated the 29th January, 1963 of the Allahabad High Court in Criminal Appeal No. 998 of 1962.

M. K. Ramamurthi, S. C. Agarwala, R. K. Garg and D. P. Singh, Advocates of M/s. Ramamurthi & Co., for Appellant.

Girish Chandra, Advocate, for O. P. Rana, Advocate, for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—Sahib Singh Mehra, appellant in this appeal by Special Leave, published an article in his paper 'Kaliyug' of Aligarh, dated 22nd September, 1960, under the heading 'Ulta Chor Kotwal Ko Dante' which means that a thief reprimanded the kotwal, a police officer, though the right thing would be the other way. The article contained the following expressions, as translated :

"How the justice stands at a distance as a helpless spectator of the show as to the manner in which the illicit bribe money from plaintiffs and defendants into the pockets of Public Prosecutors and Assistant Public Prosecutors and the extent to which it reaches and to which use it is put"

The Public Prosecutor and the eleven Assistant Public Prosecutors at Aligarh requested the Superintendent of Police for obtaining the sanction of the Government for filing a complaint by the District Government Counsel in the Court of the Sessions Judge under section 500, Indian Penal Code. The Government was duly approached through proper channel and, ultimately, the Home Secretary, U.P. Government, wrote to the Inspector-General, U.P. on 1st March, 1961 :

"I am directed to convey the sanction of the State Government under section 198-B(c) of the Code of Criminal Procedure to the filing of a complaint under section 500, Indian Penal Code, in a Court of Sessions, against the Editor and Publisher of the newspaper 'Kalyug' of District Aligarh which published a news item under the caption 'Ulta Chor Kotwal Ko Dante' in its issue dated 12th September 1960, containing defamatory remarks against the Assistant Public Prosecutor Sri R. K. Sharma of District Aligarh and other police prosecuting staff of the Government in respect of their conduct in the discharge of public functions."

Thereafter, the Public Prosecutor of Aligarh filed the complaint in the Court of Session, Aligarh, praying for the summoning of the accused and for his trial according to law for the offence under section 500, Indian Penal Code.

The appellant admitted before the Sessions Judge the publication of the impugned article and stated that he never had any evil intention. He further stated that he had published the news item for the good of the public and that he had published it in most general terms to bring bad things to the notice of the Government and the authorities for the public good.

The Sessions Judge convicted him of the offence under section 500, Indian Penal Code, holding that the aforesaid statements in the article were defamatory and that the appellant was not protected by Exceptions 3 and 9 to section 499, Indian Penal Code. He sentenced the appellant to simple imprisonment for six months and a fine of Rs. 200. His appeal against the conviction was dismissed by the High Court.

Of the points sought to be urged for the appellant, we did not allow one to be urged. It was that there was no proof that the Government had sanctioned the lodging of the complaint. This point had not been taken in the Courts below and was not even taken in the petition for Special Leave. What was urged in the petition for Special Leave was that one of the questions of law which arose in the case for consideration was whether the charge framed was the one for which sanction was granted or the requisite complaint was filed. This question is very much different from the question whether the Government did grant the sanction or whether the granting of the sanction by the Government had been duly proved in the case.

The other points urged are : (1) that the sanction granted was a general sanction and not with respect to the defamation of any particular Public Prosecutor or Assistant Public Prosecutor and that such sanction was not contemplated by law ; (2) that it is not proved that the appellant had any intention to harm the reputation of any particular Public Prosecutor or Assistant Public Prosecutor ; (3) that there was no evidence that the remarks were defamatory of any particular group ; (4) that the prosecution did not lead any evidence to establish that the defamed group had any reputation which could be harmed and (5) that the remarks were for public good.

Before dealing with the contentions raised for the appellant, we may refer to the provisions of law which enable a Public Prosecutor to file a complaint for an offence under section 500 Indian Penal Code committed against a public servant. Section 198, Criminal Procedure Code provides *inter alia* that no Court shall take cognizance of an offence falling under Chapter XXI (which contains sections 499 and 500, Indian Penal Code) except upon complaint made by some person aggrieved by such offence. Section 198-B, however, is an exception to the provisions of section 198 and provides that notwithstanding anything contained in the Code, when any offence falling under Chapter XXI of the Indian Penal Code other than the offence of defamation by spoken words is alleged to have been committed against any public servant, employed in connection with the affairs of a State, in respect of his conduct in the discharge of his public functions, a Court of Session may take cognizance of such offence without the accused being committed to it for trial, upon a complaint in writing made by the Public Prosecutor. It is thus that a Public Prosecutor can file a com-

plaint in writing in the Court of Session directly with respect to an offence under section 500, Indian Penal Code, committed against a public servant in respect of his conduct in the discharge of his public functions. Sub-section (3) of section 198-B provides that no complaint under sub-section (1) shall be made by the Public Prosecutor except with the previous sanction of the Government concerned for the filing of a complaint under section 500, Indian Penal Code. The sanction referred to above, in this case, and conveyed by the Home Secretary to the Inspector-General of Police, was a sanction for making a complaint under section 500, Indian Penal Code, against the appellant with respect to the article under the heading 'Utha Chor Kotwal ko Dante', in the issue of "Kaliyug" dated 12th September, 1960, containing defamatory remarks against the Assistant Public Prosecutor, R. K. Sharma of Aligarh, and other prosecuting staff of the Government in respect of their conduct in the discharge of public functions. The sanction was therefore with respect to defamation of two persons (i) R. K. Sharma, Assistant Public Prosecutor, Aligarh; and (ii) the other police prosecuting staff of Government of Uttar Pradesh, which would be the entire prosecuting staff in the State. There was thus nothing wrong in the form of the sanction.

The case did not proceed with respect to the defamation of R. K. Sharma, Assistant Public Prosecutor, as such. We may, however, here indicate in brief this reference to the defamation of R. K. Sharma. The appellant published sometime in May 1960 something which was defamatory of R. K. Sharma. R. K. Sharma filed a complaint about it in September, 1960. The impugned article had stated, prior to the remarks to which objection has been taken, the publication of the earlier article and the news reaching the Editor that R. K. Sharma was contemplating taking action in a Court of law and then expressed that the Editor welcomed the news and would show how the bribe money reaches the Public Prosecutors how it is utilised and how justice sees all this show from a distance. The Public Prosecutor, however, in his complaint, restricted it to the defamation of R. K. Sharma and other police prosecuting staff of the U. P. Government at Aligarh. It is not possible to say that he was not competent to do so, when the sanction by the Government could be taken to be sanction for the defamation of the entire prosecuting staff in the State of Uttar Pradesh, there being no such express statement in the article as to restrict the imputation to the staff at Aligarh alone and when the remarks could be properly taken to be with reference to the prosecuting staff at Aligarh in the context of "Kaliyug" being a local weekly and the desire of the Editor to make public all these matters in a Court in proceedings to be started by R. K. Sharma in view of certain matter published about him in an earlier issue of the paper. We therefore do not consider that the sanction suffered from any defect.

The next question to determine is whether it is essential for the purpose of an offence under section 500, Indian Penal Code, that the person defamed must be an individual and that the prosecuting staff at Aligarh or of the State of Uttar Pradesh could not be said to be a 'person' which could be defamed. Section 499, Indian Penal Code, defines 'defamation' and provides *inter alia* that whoever makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in cases covered by the exceptions to the section, to defame that person. *Explanation 2* provides that it may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. It is clear therefore that there could be defamation of an individual person and also of a collection of persons as such. The contention for the appellant then reduces itself to the question whether the prosecuting staff at Aligarh can be considered to be such a collection of persons as is contemplated by *Explanation 2*. The language of *Explanation 2* is general and any collection of persons would be covered by it. Of course, that collection of persons must be identifiable in the sense that one could, with certainty say that this group of particular people has been defamed, as distinguished from the rest of the community. The prosecuting staff of Aligarh or, as a matter of fact, the prosecuting staff in the State of Uttar Pradesh, is certainly such an identifiable group or collection of persons. There is nothing indefinite about it. This group consists

of all members of the prosecuting staff in the service of the Government of Uttar Pradesh. Within this general group of Public Prosecutors of U.P. there is again an identifiable group of prosecuting staff, consisting of Public Prosecutors and Assistant Public Prosecutors, at Aligarh. This group of persons would be covered by *Explanation 2* and could therefore be the subject of defamation.

We have not been referred to any case relating to section 499, Indian Penal Code, in support of the contention for the appellant that the Public Prosecutor and Assistant Public Prosecutors at Aligarh could not form such a body of persons as would be covered by *Explanation 2* to section 499, Indian Penal Code.

The impugned remarks are *per se* defamatory of the group of persons referred to. It is no defence—and it has not been urged as defence—that the remarks were true. The defence in the Courts below was that they were for public good and the appellant was protected under *Exceptions 3 and 9* of section 499, Indian Penal Code. The tenor of the article does not indicate that the purpose of the appellant in publishing these remarks was 'public good'. According to the article, the appellant would have welcomed the opportunity that would be offered by the case contemplated against him by R. K. Sharma, to make public the impugned matters. His remarks therefore could have the tendency to dissuade R. K. Sharma from instituting the proceedings for fear of giving greater currency to untrue allegations which be not favourable to him or to the prosecuting staff at Aligarh or in the State, and by themselves could not render any public good. No enquiry could have been started by the Government on such a publication implying the passing of money from the pockets of certain set of people to the pockets of the prosecuting staff. The impugned remarks could certainly lead the readers of the article to believe or suspect that the prosecuting staff is corrupt in the discharge of its duties as Public Prosecutors, and are thus bound to affect the reputation of the prosecuting staff adversely. Unless proved otherwise, the presumption is that every person has a good reputation. In this case, the Public Prosecutor and Assistant Public Prosecutor had deposed that they are not corrupt, and according to their knowledge, none at Aligarh, is corrupt in the discharge of his duty. There is no evidence to the contrary.

Exception 3 to section 499, Indian Penal Code, comes into play when some defamatory remark is made in good faith. Nothing has been brought on the record to establish that those defamatory remarks were made by the appellant after due care and attention and so, in good faith.

Exception 9 gives protection to imputations made in good faith for the protection of the interest of the person making it or of any other person or for the public good. The appellant has not established his good faith and, as we have said above, the imputations could not have been said to have been made for the public good.

We are therefore of opinion that the appellant has been rightly held to have committed the offence under section 500, Indian Penal Code, by defaming the Public Prosecutor and Assistant Public Prosecutors at Aligarh.

It is urged for the appellant that the sentence is severe and be reduced to the period of imprisonment already undergone. We do not see any justification for reducing the sentence. The Press has great power in impressing the minds of the people and it is essential that persons responsible for publishing anything in newspapers should take good care before publishing anything which tends to harm the reputation of a person. Reckless comments are to be avoided. When one is proved to have made defamatory comments with an ulterior motive and without the least justification motivated by self-interest, he deserves a deterrent sentence.

We dismiss the appeal. The appellant will surrender to his bail.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction.)

PRESENT :—RAGHUBAR DAYAL, J. R. MUDHOLKAR AND V. RAMASWAMI, JJ.

Bhaurao Shankar Lokhande and another

.. Appellants*

v.

The State of Maharashtra and another

... Respondents.

Hindu Marriage Act (XXV of 1955), section 17, Penal Code (XLV of 1860), sections 484 and 485—Offence of contracting second marriage—Second marriage, to be a valid marriage according to law applicable

Hindu Law—Gandharva form of marriage—Essential ceremonies—Invocation before fire and saptapadi also essential—Custom—Proof—Gandharva marriage—Touching of foreheads—Custom, not established.

The second marriage contemplated as an offence under section 17 of the Hindu Marriage Act and section 484 of the Penal Code must be a valid marriage performed in accordance with the requirements of the law applicable to a marriage between the parties.

The word 'solemnize' in section 17 of the Hindu Marriage Act means, "to celebrate with proper ceremonies and in due form".

The essentials of a valid marriage among the Hindus (including Gandharva marriage) are the invocation before the sacred fire and *saptapadi*, unless otherwise allowed by custom.

The expressions 'custom' and 'usage' in section 3 (a) of the Hindu Marriage Act signify any rule, which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family

The custom of touching the foreheads for the validity of a *gandharva* form of marriage was held not proved.

Appeal by Special Leave from the Judgment and Order dated the 19th August, 1963 of the Bombay High Court in Criminal Revision Application No. 388 of 1963.

S. G. Patwardhan, Senior Advocate (M. S. Gupta, Advocate, with him), for Appellants.

W. S. Barlingay, Senior Advocate (B. R. G. K. Achar, Advocate, for R. H. Dhebar, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—Bhaurao Shankar Lokhande, appellant No. 1, was married to the complainant Indubai in about 1956. He married Kamlabai in February, 1962, during the lifetime of Indubai. Deorao Shankar Lokhande, appellant No. 2, is the brother of the first appellant. These two appellants, together with Kamlabai and her father and accused No. 5, a barber, were tried for an offence under section 494, Indian Penal Code. The latter three were acquitted by the Magistrate. Appellant No. 1 was convicted under section 494, Indian Penal Code and appellant No. 2 for an offence under section 494 read with section 114, Indian Penal Code. Their appeal to the Sessions Judge was dismissed. Their revision to the High Court also failed. They have preferred this appeal by Special Leave.

The only contention raised for the appellants is that in law it was necessary for the prosecution to establish that the alleged second marriage of the appellant No. 1 with Kamlabai in 1962 had been duly performed in accordance with the religious rites applicable to the form of marriage gone through. It is urged for the appellants that the essential ceremonies for a valid marriage were not performed during the proceedings which took place when appellant No. 1 and Kamlabai married each other. On behalf of the State it is urged that the proceedings of that marriage were in accordance with the custom prevalent in the community of the appellant for *gandharva* form of marriage and that therefore the second marriage of appellant No. 1 with Kamlabai was a valid marriage. It is also urged for the

State that it is not necessary for the commission of the offence under section 494, Indian Penal Code, that the second marriage be a valid one and that a person going through any form of marriage during the life time of the first wife would commit the offence under section 494, Indian Penal Code, even if the later marriage be void according to the law applicable to that person.

Section 494, Indian Penal Code, reads :

“Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine”

Prima facie, the expression ‘whoever marries’ must mean ‘whoever marries validly’ or ‘whoever marries and whose marriage is a valid one.’ If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife.

Apart from these considerations, there is nothing in the Hindu law, as applicable to marriages till the enactment of the Hindu Marriage Act of 1955, which made a second marriage of a male Hindu, during the lifetime of his previous wife, void. Section 5 of the Hindu Marriage Act provides that a marriage may be solemnized between any two Hindus if the conditions mentioned in that section are fulfilled and one of those conditions is that neither party has a spouse living at the time of the marriage. Section 17 provides that any marriage between two Hindu solemnized after the commencement of the Act is void if at the date of such marriage either party had a husband or wife living, and that the provisions of sections 494 and 495, Indian Penal Code, shall apply accordingly. The marriage between two Hindus is void in view of section 17 if two conditions are satisfied : (i) the marriage is solemnized after the commencement of the Act ; (ii) at the date of such marriage, either party had a spouse living. If the marriage which took place between the appellant and Kamlabai in February, 1962, cannot be said to be ‘solemnized,’ that marriage will not be void by virtue of section 17 of the Act and section 494, Indian Penal Code, will not apply to such parties to the marriage as had a spouse living.

The word ‘solemnize’ means, in connection with a marriage, ‘to celebrate the marriage with proper ceremonies and in due form’ according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is ‘celebrated or performed with proper ceremonies and due form’ it cannot be said to be ‘solemnized’. It is therefore essential, for the purpose of section 17 of the Act, that the marriage to which section 494, Indian Penal Code, applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom.

We are of opinion that unless the marriage which took place between appellant No. 1 and Kamlabai in February, 1962, was performed in accordance with the requirements of the law applicable to a marriage between the parties, the marriage cannot be said to have been ‘solemnized’ and therefore appellant No. 1 cannot be held to have committed the offence under section 494, Indian Penal Code.

We may now determine what the essential ceremonies for a valid marriage between the parties are. It is alleged for the respondent that the marriage between appellant No. 1 and Kamlabai was in ‘*gandharva*’ form, as modified by the custom prevailing among the Maharashtrians. It is noted in Mulla’s Hindu Law, 12th Edition, at page 605 :

“The ‘*gandharva*’ marriage is the voluntary union of a youth and a damsel which springs from desire and sensual inclination. It has at times been erroneously described as an euphemism for

concubinage. This view is based on a total misconception of the leading texts of the Smritis. It may be noted that the essential marriage ceremonies are as much a requisite part of this form of marriage as of any other unless it is shown that some modification of those ceremonies has been introduced by custom in any particular community or caste."

At page 615 is stated :

"(1) There are two ceremonies essential to the validity of a marriage, whether the marriage be in the Brahma form or the Asura form, namely—

(1) invocation before the sacred fire, and

(2) *saptapadi*, that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire.

(2) A marriage may be completed by the performance of ceremonies other than those referred to in sub-section (1), where it is allowed by the custom of the caste to which the parties belong."

It is not disputed that these two essential ceremonies were not performed when appellant No. 1 married Kamlabai in February, 1962. There is no evidence on record to establish that the performance of these two essential ceremonies has been abrogated by the custom prevalent in their community. In fact, the prosecution led no evidence as to what the custom was. It led evidence of what was performed at the time of the alleged marriage. It was the Counsel for the accused in the case who questioned certain witnesses about the performance of certain ceremonies and to such questions the witnesses replied that they were not necessary for the '*gandharva*' form of marriage in their community. Such a statement does not mean that the custom of the community deemed what took place at the 'marriage' of the appellant No. 1 and Kamlabai, sufficient for a valid marriage and that the performance of the two essential ceremonies had been abrogated. There ought to have been definite evidence to establish that the custom prevalent in the community had abrogated these ceremonies for such form of marriage.

What took place that night when appellant No. 1 married Kamlabai, has been stated thus, by P.W. 1 :

"The marriage took place at 10 P.M., *Pat*—wooden sheets—were brought. A carpet was spread. Accused No. 1 then sat on the wooden sheet. On the other sheet accused No. 3 sat. She was sitting nearby accused No. 1. Accused No. 4 then performed some Puja by bringing a Tambya—pitcher. Betel leaves and coconut was kept on the Tambya. Two garlands were brought. Accused No. 2 was having one and accused No. 4 having one in his hand. Accused No. 4 gave the garland to accused No. 3 and accused No. 2 gave the garland to accused No. 1. Accused Nos. 1 and 3 then garlanded each other. Then they each struck each other's forehead."

In cross-examination this witness stated :

"It is not that '*Gandharva*' according to our custom is performed necessarily in a temple. It is also not that a Brahmin Priest is required to perform the '*Gandharva*' marriage. No '*Mangala Ashtakas*' are required to be chanted at the time of '*Gandharva*' marriage. At the time of marriage in question, no Brahmin was called and Mangala Ashtakas were chanted. There is no custom to blow a pipe called '*Bher*' in vernacular."

Sitaram, witness No. 2 for the complainant, made a similar statement about what happened at the marriage ceremony and further stated, in the examination-in-chief :

"Surjan is the village of accused No. 3's maternal uncle and as the custom is not to perform the ceremony at the house of maternal uncle, so it was performed at another place. There is no custom requiring a Brahmin Priest at the time of '*Gandharva*'."

He stated in cross-examination :

"A barber is not required and accused No. 5 was not present at the time of marriage. There is a custom that the father of girl should make to touch the foreheads of the girl and boy to each other and the '*Gandharva*' is completed by the act."

It is urged for the respondent that as the touching of the forehead by the bridegroom and the bride is stated to complete the act of '*Gandharva*' marriage, it must be concluded that the ceremonies which, according to this witness, had been performed, were all the ceremonies which, by custom, were necessary for the validity of the marriage. In the absence of a statement by the witness himself that according to custom these ceremonies were the only necessary ceremonies for a valid marriage, we cannot construe the statement that the touching of the fore-

reads completed the 'Gandharva' form of marriage and that the ceremonies gone through were all the ceremonies required for the validity of the marriage.

Bhagwan, witness No. 3 for the complainant, made no statement about the custom, but stated in cross-examination that it was not necessary for the valid performance of 'Gandharva' marriage in their community that a Brahmin Priest was required and Mangal Ashtakas were to be chanted. The statement of Jeebhau, witness No. 4 for the complainant, does not show how the custom has modified the essential forms of marriage. He stated in cross-examination :

"I had witnessed two 'Gandharvas' before this. For the last 5 or 7 years a Brahmin Priest, a barber and a Thakur is not required to perform the 'Gandharva' but formerly it was essential. Formerly the Brahmin used to chant Mantras and Mangal Ashtakas. It was necessary to have a maternal uncle or any other person to make touch the foreheads of the sponsors together. A Brahmin from Kasara and Dhadana comes to our village for doing rituals but I do not know their names."

This statement too, does not establish that the two essential ceremonies are no more necessary to be performed, for a 'Gandharva' marriage. The mere fact that they were probably not performed in the two 'Gandharva' marriages Jeebhau had attended, does not establish that their performance is no more necessary according to the custom in that community. Further, Jeebhau has stated that about five or seven years earlier the performance of certain ceremonies which, till then, were essential for the marriage, were given up. If so, the departure from the essentials cannot be said to have become a custom, as contemplated by the Hindu Marriage Act.

Clause (a) of section 3 of the Act provides that the expressions 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family.

We are therefore of opinion that the prosecution has failed to establish that the marriage between appellant No. 1 and Kamlabai in February, 1962, was performed in accordance with the customary rites as required by section 7 of the Act. It was certainly not performed in accordance with the essential requirements for a valid marriage under Hindu law.

It follows therefore that the marriage between appellant No. 1 and Kamlabai does not come within the expression 'solemnized marriage' occurring in section 17 of the Act and consequently does not come within the mischief of section 494, Indian Penal Code even though the first wife of appellant No. 1 was living when he married Kamlabai in February, 1962.

We have not referred to and discussed the cases referred to in support of the contention that the 'subsequent marriage' referred to in section 494, Indian Penal Code, need not be a valid marriage, as it is unnecessary to consider whether they have been correctly decided, in view of the fact that the marriage of appellant No. 1 with Kamlabai could be a void marriage only if it came within the purview of section 17 of the Act.

The result is that the conviction of appellant No. 1 under section 494, Indian Penal Code, and of appellant No. 2 under section 494 read with section 114, Indian Penal Code, cannot be sustained. We, therefore, allow their appeal, set aside their convictions and acquit them. The bail bonds of appellant No. 1 will stand discharged. Fines, if paid, will be refunded.

V.S.

Appeal allowed; Conviction set aside.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, Chief Justice, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Puran Singh and another *Appellants**

The State of Madhya Pradesh *Respondent*

Motor Vehicles Act (IV of 1939), section 130 (1) (a), (b)—Cognizance of offence not specified in Part A of Fifth Schedule—Summons to accused either to appear in person or to plead guilty by registered letter and remit the fine—Discretionary power to follow either of the two procedures.

In respect of an offence punishable under sections 124 and 112 of the Motor Vehicles Act, the Magistrate has, under section 130 of the Act, a discretionary power to state upon the summons to the accused either to require his appearance, or allow him to plead guilty to the charge by registered letter and to remit the fine. There is nothing in the section compelling the Magistrate to endorse on the summons requiring the accused to plead guilty and pay the fine in all cases, not specified in Part A of the Fifth Schedule.

Appeal from the Judgment and Order dated 30th April, 1963, of the Madhya Pradesh High Court in Criminal Revision No. 24 of 1963.

Ravinder Narain, O. C. Mathur and J. B. Dadachanj, Advocates of M/s. J. B. Dadachanj & Co., for Appellants.

I. N. Shroff, Advocate, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Station House Officer, Gharsiwa, filed an information in the Court of the Magistrate, First Class, Raipur, against the two appellants complaining that they had on 10th March, 1962, allowed three passengers to occupy the front seat in a public carrier and had loaded goods in excess of the sanctioned weight, and had thereby committed offences punishable under sections 124 and 112 of the Motor Vehicles Act IV of 1939. The Magistrate issued process against the appellants for their appearance in Court by Pleader, but did not make any endorsement thereon in terms of section 130 (1) (b) of the Act. The appellants submitted that the summonses served upon them were not according to law and the Magistrate by failing to make an endorsement on the summonses as required by clause (b) of sub-section (1) of section 130 of the Act had deprived them of the right conferred by the Act to intimate without appearing in Court their plea of guilty and remitting an amount not exceeding Rs. 25 as may be specified. The Magistrate rejected this plea and directed that the case against the appellants be "proceeded further according to law".

The Sessions Judge, Raipur, in a petition moved by the appellants made a reference to the High Court of Madhya Pradesh recommending that the order passed by the Magistrate be set aside, for in his view the trial Magistrate having failed to comply with the mandatory terms of section 130 (1) (b) the proceeding against the appellants was unlawful. The High Court of Madhya Pradesh declined to accept the reference. Against that order, with certificate granted by the High Court, the appellants have preferred this appeal.

Section 130 of the Motor Vehicles Act which occurs in Chapter IX which relates to "Offences, Penalties and Procedure" provides :

"(1) A Court taking cognizance of an offence under this Act shall, unless the offence is an offence specified in Part A of the Fifth Schedule, state upon the summons to be served on the accused person that he—

(a) may appear by pleader and not in person, or

(b) may by a specified date prior to the hearing of the charge plead guilty to the charge by registered letter and remit to the Court such sum not exceeding twenty-five rupees as the Court may specify.

(2) Where the offence dealt with in accordance with sub-section (1) is an offence specified in Part B of the Fifth Schedule, the accused person shall, if he pleads guilty of the charge, forward

his licence to the Court with the letter containing his plea in order that the conviction may be endorsed on the licence.

(3) Where an accused person pleads guilty and remits the sum specified and has complied with the provisions of sub-section (2), no further proceedings in respect of the offence shall be taken against him, nor shall he be liable to be disqualified for holding or obtaining a licence by reason of his having pleaded guilty."

Offences under sections 112 and 124 of the Act with which the appellants were charged are not included in the first part of the Fifth Schedule to the Act, and the Magistrate was therefore bound to comply with the terms of section 130 (1). There can be no doubt on the plain terms of section 130 (1) that the provision is mandatory. But there was difference of opinion about the nature of the duty imposed by sub-section (1) upon the Court taking cognizance of the complaint. The Sessions Judge held that a Magistrate taking cognizance of an offence of the nature specified had, by virtue of section 130 (1) to make an endorsement on the summons in terms of clauses (a) and (b) and thereby to give an option to the person charged either to appear by pleader or to plead guilty to the charge by registered letter and remitting herewith the sum specified in the summons, and if the Magistrate failed to give that option, the proceedings initiated would be liable to be set aside as infringing the mandatory provision of the Act. The High Court was of the view that sub-section (1) of section 130 left an option to the Magistrate exercisable on a consideration of the materials placed before him when taking cognizance of an offence to issue a summons without requiring the accused to appear by Pleader or call upon him to plead guilty to the charge by registered letter and to remit the fine specified in the summons. According to the High Court therefore the Magistrate had the option to issue a summons with an endorsement in terms of sub-section (1) (a) or of sub-section (1) (b) and only if a summons was issued with the endorsement specified by sub-section (1) (b) it was open to the accused to avail himself of the option to plead guilty and to claim the privilege mentioned in sub-section (3).

In our judgment the High Court was right in the view it has taken. The Magistrate taking cognizance of an offence is bound to issue summons of the nature prescribed by sub-section (1) of section 130. But there is nothing in that sub-section which indicates that he must endorse the summons in terms of both the clauses (a) and (b) : to hold that he is so commanded would be to convert the conjunction "or" into "and". There is nothing in the words used by the Legislature which justifies such a conversion, and there are strong reasons which render such an interpretation wholly inconsistent with the scheme of the Act.

The procedure in sub-section (1) of section 130 applies to cases in which the offence charged is not one of the offences specified in Part A of the Fifth Schedule, but applies to the other offences under the Act. The maximum penalty which is liable to be imposed in respect of these offences defined by the Act is in no case Rs. 25 or less. It could not have been the intention of the Legislature that the offender, even if the case was serious enough to warrant the imposition of the maximum penalty which is permissible under the section to which the provision is applicable, to avoid imposition of a higher penalty than Rs. 25 by merely pleading guilty. Section 130, it appears, was enacted with a view to protect from harassment a person guilty of a minor infraction of the Motor Vehicles Act or the Rules framed thereunder by dispensing with his presence before the Magistrate and in appropriate cases giving him an option to plead guilty to the charge and to remit the amount which can in no case exceed Rs. 25. If the view which prevailed with the Sessions Judge were true, a person guilty of a serious offence meriting the maximum punishment prescribed for the offence may by pleading guilty under sub-section (1)(b) escape by paying an amount which cannot exceed Rs. 25. Again the Magistrate is authorised under section 17 of the Act in convicting an offender of an offence under the Act, or of an offence in the commission of which a motor vehicle was used, in addition to imposing any other punishment to pass an order declaring the offender unfit for holding a driving licence generally, or for holding a driving licence for a particular class or description of vehicle. Such an order may be passed if it appears to the Court, having regard to the gravity of the offence, inaptitude shown

by the offender or for other reasons, that he is unfit to obtain or hold a driving licence. But if the offender avails himself of the option given to him by the Magistrate of pleading guilty, no further proceeding in respect of the offence can in view of sub-section (3) of section 130 be taken against him, and he will not be liable to be disqualified for holding or obtaining a licence, though he may otherwise eminently deserve to be disqualified for holding a licence.

It is true that to an offence punishable with imprisonment in the commission of which a motor vehicle was used section 130 (1) does not apply; see Schedule Five, Part A, Item 9. But there are offences under the Motor Vehicles Act which do not fall within that description and also do not fall under other items, which are punishable with imprisonment, e.g., section 113 (2). There are also certain offences which, if repeated but not otherwise, are liable to be punished with imprisonment, e.g., certain offences under section 118-A and under section 123 of the Act. It would be difficult to hold that the Legislature could have intended that irrespective of the seriousness or gravity of the offence committed, the offender would be entitled to compound the offence by paying the amount specified in the summons which the Magistrate would be bound to accept, if the contention raised by the appellants is correct.

Having regard to the phraseology used by the Legislature which *prima facie* gives a discretion to the Magistrate exercisable at the time of issuing the summons, and having regard also to the scheme of the Act, we are of the view that the High Court was right in holding that the Magistrate is not obliged in offences not specified in Part A of the Fifth Schedule to make an endorsement in terms of clause (b) of sub-section (1) of section 130 of the Act. We are of the opinion that the view to the contrary expressed by the High Court of Allahabad in *State of U.P. v. Mangal Singh*¹, and the High Court of Assam in *State of Assam v. Suleman Khan*², on which the Sessions Judge relied is not correct.

The appeal therefore fails and is dismissed.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, J. R. MUDHOLKAR AND S. M. SIKRI, JJ.
The Cantonment Board, Ambala

.. Appellant*

v.

Pyare Lal

.. Respondent.

Constitution of India (1950), Article 136—New plea regarding jurisdiction not depending on facts—Right to raise for the first time before the Supreme Court.

Cantonments Act (II of 1924) as amended by Act (II of 1954), section 259—Scope—Lease of land and buildings vested in or entrusted to the management of the Cantonment Board—Arrears of rent due to Cantonment Board under the lease—If can be recovered under section 259.

Per Wanchoo and Sikri, JJ.—The contention that the Magistrate when he is acting under section 259 of the Cantonments Act (II of 1924) acts as a *persona designata* and so his order under that section is not revisable by the Sessions Judge and the High Court under sections 435/439 of the Criminal Procedure Code (V of 1898) cannot be raised for the first time before the Supreme Court. It is true that a question of jurisdiction not depending upon facts to be investigated can be allowed to be raised at any stage. But though the High Court may not have jurisdiction to interfere under sections 435/439 of the Criminal Procedure Code with an order under section 259 of the Cantonments Act (II of 1924), it can certainly do so under Article 227 of the Constitution of India. If the point had been raised before the High Court it may very well be that the High Court might have considered the reference under section 439 of the Criminal Procedure Code as if it was an application under Article 227 of the Constitution of India, in which case it would have had jurisdiction to deal with the matter.

Per Mudholkar, J :—Further, it would not be fair to the respondent who is *ex parte* to have the appeal decided upon a new ground altogether.

1. (1962) 1 Cr.L.J. 684.

2. (1961) 2 Cr.L.J. 869.

* Cr.L. Appeal No. 151 of 1963.

By majority (with *Mudholkar, J.* dissenting):—The words “rent on land and buildings” mentioned in section 259 of the Cantonments Act (II of 1924) as amended by Act (II of 1954) are governed by the words “recoverable by a Board or a Military Estates Officer under this Act or the Rules made thereunder”. Therefore the provisions of section 259 can be utilised for realisation of arrears of rent on land and buildings only if such rent is recoverable by a Cantonment Board or a Military Estates Officer under the Cantonments Act or the Rules made thereunder. The word “recoverable” in section 259 in the context obviously means “claimable” for section 259 itself provides for the manner of recovery. Therefore action for recovery can be taken under section 259 with respect to rent on land and buildings provided such rent is claimable by a Cantonment Board or a Military Estates Officer under the Cantonments Act or the Rules framed thereunder.

There is no doubt that in view of sections 116 and 116-A of the Cantonments Act (II of 1924) and some of the provisions of the Cantonment Property Rules (1925) and Cantonment Land Administration Rules (1937), the Cantonment Board has the power to manage land and buildings vested in it or entrusted to its management, lease them out and fix rents therefor. But the right of the Cantonment Board to claim the rent on land and buildings so leased only arises after the execution of the lease. Therefore rent on land and buildings leased by the Cantonment Board is not claimable by the Cantonment Board under the provisions of the Cantonments Act or the Rules framed thereunder but only under the lease, particularly after rule 42 of the Cantonment Land Administration Rules (1937) has been repealed in 1940. It would follow that arrears of rent due to the Cantonment Board under a contract of lease of its land and buildings cannot be recovered under section 259.

It cannot be said that there is no provision in the Cantonments Act (II of 1924) which specifically provides for a claim of rent by the Cantonment Board. Section 257 read with 256 is an example of the Cantonment Board's power to claim rent under the Cantonments Act.

The contention that as section 259 provides for recovery by suit also it will not be possible for the Cantonment Board to recover rent of land and buildings let out by it even by suit if the rent in the section refers only to rent directly claimable under the Cantonment Act or the Rules, is untenable. The section does not bar the right of the Cantonment Board as an owner or holder of land and buildings to take action for recovery of rent thereof by suit under the general law of the land.

Appeal by Special Leave from the Judgment and Order, dated 27th March, 1962 of the Punjab High Court in Criminal Revision No. 1137 of 1961.

Gopal Singh, Advocate, for Appellant.

The Court delivered the following Judgments —

Wanchoo, J. (for himself and *Sikri, J.*):—This appeal by Special Leave raises the question of the interpretation of section 259 of the Cantonments Act, (II of 1924), (hereinafter referred to as the Act). The respondent was a tenant of the appellant. An application was made by the Cantonment Executive Officer, Ambala, on 7th January, 1960, for realisation of a sum of Rs. 649-50 from the respondent under section 259 of the Act on the ground that the amount was due as arrears of rent on the basis of a lease in favour of the respondent. The respondent apparently questioned the jurisdiction of the Magistrate to realise the amount. The Magistrate held that he had jurisdiction and issued warrants for attachment of the movable property of the respondent on 13th June, 1961. Thereupon the respondent went in revision to the Sessions Judge, Ambala contending that the Magistrate had no jurisdiction to realise the arrears of rent due under a lease under section 259 of the Act and in any case that could not be done without taking into account the objections of the respondent. The Sessions Judge following certain earlier decisions of the Lahore High Court took the view that rent under a lease could not be recovered under section 259 of the Act and made a reference to the High Court under section 439 of the Code of Criminal Procedure. The High Court heard the reference and accepted the view of the Sessions Judge and set aside the order of the Magistrate dated 13th June, 1961. The High Court having refused the certificate, the appellant obtained Special Leave from this Court; and that is how the matter has come up before us.

Two questions have been raised by learned Counsel for the appellant in this appeal. In the first place, he urges that the Magistrate when he is acting under section 259 of the Act is a *persona designata* and therefore his order is not revisable under sections 435/439 of the Code of the Criminal Procedure. The Sessions Judge and the High Court therefore had no jurisdiction to interfere with that order under

sections 435/439 of the Code of Criminal Procedure. Secondly, it is urged that the view taken by the High Court that arrears of rent due under a lease cannot be recovered under section 259 of the Act is incorrect.

The question as to the jurisdiction of the Sessions Judge and High Court was never raised before the appeal in this Court. Learned Counsel, however, relies on the *Dargah Committee, Ajmer v. State of Rajasthan*¹, in support of his contention that the Magistrate acting under section 259 of the Act acts as a *persona designata* and therefore his order under that section is not revisable under section 435/439 of the Code of Criminal Procedure and the Sessions Judge and the High Court had no jurisdiction under those provisions to interfere with such an order. The case cited on behalf of the appellant certainly supports the contention put forward; but in the circumstances of this case we are not prepared to allow this contention to be raised at this stage. It is true that a question of jurisdiction, not depending upon facts to be investigated, can be allowed to be raised at any stage. Ordinarily if we were satisfied that the High Court had no jurisdiction at all to interfere we would have allowed this question to be raised even at this late stage. But we are of opinion that though the High Court may not have jurisdiction to interfere under sections 435/439 of the Code of Criminal Procedure it could certainly interfere with the order of the Magistrate under Article 227 of the Constitution. Now if this point had been raised before the High Court it may very well be that the High Court might have considered the reference as if it was an application before it under Article 227 of the Constitution, in which case the High Court would have jurisdiction to interfere with the order of the Magistrate if it came to the conclusion that the Magistrate has no jurisdiction in such circumstances under section 259 of the Act. In these circumstances we are not prepared to permit the appellant to raise this point before us at this late stage.

This brings us to the interpretation of section 259 of the Act as it stood after amendment by Act II of 1954. The relevant part of the section now reads as follows :—

“Notwithstanding anything elsewhere contained in this Act, arrears of any tax, rent on land and buildings and any other money recoverable by a Board or a Military Estates Officer under this Act or the Rules made thereunder may be recovered together with the cost of recovery either by a suit or, on application to a Magistrate having jurisdiction in the cantonment or in any place where the person from whom such tax, rent or money is recoverable may for the time being be residing, by the distress and sale of any movable property of, or standing timber, or growing crop belonging to such person which is within the limits of such Magistrate's jurisdiction, and shall be payable by the owner of any property as such, be a charge on the property until paid; provided

(2)

The first question that arises is whether rent on land and building mentioned in the section is governed by the words “recoverable by a Board or a Military Estates Officer under this Act or the Rules made thereunder”. There is no doubt that “any tax” and “any other money” mentioned in the section are governed by the words “recoverable by a Board etc.” It seems to us that the words “rent on land and buildings” which appear between the words “any tax” and “any other money” must equally be governed by the words “recoverable by a Board etc.” Therefore the provisions of section 259 of the Act can be utilised for realisation of arrears of rent on land and buildings only if such rent is recoverable by a Board or a Military Estates Officer, under the Act or the Rules made thereunder. The word “recoverable” in the context obviously means “claimable”, for section 259 itself provides for the manner of recovery. Therefore action for recovery can be taken under section 259 with respect to rent on land and buildings provided such rent is claimable by a Board under the Act or the Rules framed thereunder. This view was taken by the Lahore High Court in *Banarsi Das v. Caneonmeni Authority*², and is in our opinion correct. It may be added that in 1938, the words “rent on land and buildings”

1. (1962) 1 S.C.J. 323 : (1962) M.L.J. (Cr.) 321 : (1962) 2 S.C.R. 265.

2. A.I.R. 1933 Lah. 517.

and "under the Rules" did not appear in section 259. Even so, the Lahore High Court took the view with respect to the section as it then stood that the money to be recovered under section 259 must be claimable by the Board under the Act.

The next question that arises is whether "rent on land and buildings" on lease can be said to be claimable by the Board "under the Act or the Rules, made thereunder". It is urged on behalf of the appellant that clause (p) of section 116 of the Act provides for "maintaining and developing the value of property vested in, or entrusted to the management of the Board", and section 116-A gives the Board power to manage any property entrusted to its management by the Central Government on such terms as to the sharing of rents and profits accruing from such property as may be determined by rule. Further reliance is placed on the Cantonment Property Rules 1925. Rule 8 thereof provides that immovable property which vests in and belongs to the Cantonment Authority may be leased by the Cantonment Authority without a premium on the condition that a reasonable rent is reserved and made payable during the whole term of the lease and that the lease or the agreement for the lease is not made without the previous sanction of the Cantonment Authority by resolution at a general meeting, or the Officer Commanding-in-Chief of the Command or the Government of India as the case may be. It is urged that these provisions of the Act and the Rules show that the Board has the power to claim rent thereunder in respect of the leased property. Reliance is further placed on the Cantonment Land Administration Rules, 1937, which provide how rents would be fixed when land is leased out by the Cantonment Authority. Rule 4 of these Rules provides for classification of land and rule 8 for standard table of rents; rule 9 (6) vests the management of class 'C' land in the Board; rule 26 provides for disposal of land by private agreement; rule 28 for execution of leases, rule 29 and 30 for maintenance of grants registers of building sites; rule 31 for leases for special periods and on special terms; rule 32 for agricultural land leases; rule 34 for record of agricultural leases; rule 35 for execution of agricultural leases; rule 37 for leases for miscellaneous purposes and rule 41 for special conditions in leases. It may be mentioned that originally there was a rule (rule 42) in these terms—

"Recovery of arrears.—All arrears of rent and other payment under these rules together with interest on such arrears at the rate of seven and a half per cent. per annum from the date when they become due to the date of their realisation, shall, on the application of the person specified in sub-section (2) of section 259 of the Act, or the Military Estates Officer, as the case may be, be recoverable in the manner provided in that section."

That rule however no longer exists as it was repealed in 1940.

There is no doubt that in view of the provisions of the Act, the Property Rules and the Land Administration Rules to which we have referred above, the Board has the power to manage lands and buildings vested in it or entrusted to its management, lease them out and fix rents therefor. But the right of the Board to claim the rent on land and buildings does not arise from these provisions under the Act and the Rules referred to above. The right of the Board to claim rent only arises after the execution of the lease. Therefore rent on land and buildings is not claimable by the Board under the provisions of the Act or the Property Rules or the Land Administration Rules but under the lease. It follows therefore that section 259 (1) cannot be applied to a simple case of money due to the Board on a contract of lease.

It is however urged on behalf of the appellant that the words "rent on land and buildings" which were added by the 1954-Amendment refer to something of that kind which is recoverable under section 259 as otherwise the amendment would be meaningless. That is undoubtedly so. We find however that section 256 provides that in the event of non-compliance with the terms of any notice, order or requisition issued to any person under this Act, or any Rule or Bye-law made thereunder or requiring such persons to execute any work or to do any act, it shall be lawful for the Cantonment Authority after giving notice in writing to such person, to take such action or such steps as may be necessary for the completion of the act or work re-

quired to be done or executed by him, and all the expenses incurred on such account shall be recoverable by the Cantonment Authority. Section 257 then provides that if any such notice as is referred to in section 256 has been given to any person in respect of property of which he is the owner, the Cantonment Authority may require any occupier of such property or of any part thereof to pay to it, instead of to the owner, any rent payable by him in respect of such property, as it falls due, upto the amount recoverable from the owner under section 256 and it further provides that any amount recovered from any occupier instead of from an owner under sub-section (1) shall, in the absence of any contract between the owner and the occupier to the contrary, be deemed to have been paid to the owner. Here at any rate we have an example of the Board's power to claim rent from a tenant of an owner under section 257 of the Act read with section 256. So it cannot be said that there is no case where the Act provides for claim of rent by the Board. We may add that there may be other cases like this either under the Act or under the Rules. In our view it is in such cases where the Act or the Rules in terms make the rent on land and buildings claimable by the Board, that section 259 will apply. But where the liability to pay rent arises purely on the basis of a lease between the Board and the tenant, nothing in the Act or the Rules has been brought to our notice, particularly after rule 42 referred to above has been repealed, which makes such rent claimable by the Board under the Act or the Rules. We may add rule 42 was repealed long before 1954 when the words "rent on land and buildings" came in section 259. So it cannot be argued that the omission of rule 42 was due to the amendment of 1954.

It is urged that the section provides for recovery by suit also and as such it will not be possible for the Board to recover rent of land and buildings let out by it even by suit if the rent in the section refers only to rent directly claimable under the Act or the Rules. This is clearly incorrect. The section does not bar the right of the Board as an owner or holder of land and buildings to take action for recovery of rent thereof by suit under the general law of the land. Further by providing for recovery of rent of the kind we have indicated above by suit or by application to Magistrate the section does not affect the right of the Board to recover rent of its land and buildings by suit for such rents are entirely outside the section and the right of the Board under the general law of the land is not taken away by the section. It may be that the section provided for recovery by suit as an alternative as a matter of abundant caution to avoid an argument that the application to a Magistrate was the only means open to the Board for recovery of sums covered by the section. In any case the view we are taking will not affect the right of the Board to recover by suit under the general law rent of its land and buildings given on lease.

In the circumstances we agree with the High Court that the rent in this case was not claimable by the Board under the Act or the Rules but only under the lease in favour of the respondent. Therefore section 259 (1) in so far as it refers to recovery of such rent by application to a Magistrate will not apply.

In the circumstances the appeal fails and is hereby dismissed.

Mudholkar, J.—The question which falls for determination in this appeal is whether under section 259 of the Cantonment Act (II of 1924) 'rent' on land or buildings under the management of the Cantonment Board can be recovered thereunder by a Magistrate. This question was raised by the respondent in a revision application made by him before the Sessions Judge under section 435 of the Code of Criminal Procedure against the order of the Magistrate, Second Class, made under the aforesaid provision upon an application made to him by the Executive Officer, Ambala Cantonment, for the recovery of Rs. 649-50 nP. being the arrears of rent alleged to be due from the respondent to the Cantonment Board. The learned Sessions Judge made a reference to the High Court under section 438 of the Code of Criminal Procedure on the authority of the decisions in *Municipal Committee, Delhi v. Hafiz Abdullah*¹, and *Guranditta Mal v. Emperor*². The High Court,

1. A.I.R. 1934 Lah. 699.

2. A.I.R. 1938 Lah. 29.

after referring to these cases and to *Banarsi Das v. Cantonment Authority, Ambala Cantonment*¹, accepted the reference and set aside the order of the Magistrate. By Special Leave the Cantonment Board has come up to this Court in appeal.

Two points were urged by Mr. Gopal Singh appearing for the appellant. The first is that the proceeding before the Magistrate was not one under the Code of Criminal Procedure and, therefore, neither could a reference be made by the Sessions Judge to the High Court under section 438, Criminal Procedure Code, nor could an order be made by the High Court under section 439. The second point is that upon correct interpretation of section 259 of the Act the Magistrate had the power to recover the rent due to the appellant in the manner provided for in the section. We did not allow the first contention to be raised for two reasons. In the first place the point was not raised in the High Court and in the second place it would not be fair to the respondent who is *ex parte* to have the appeal decided upon a new ground altogether.

In so far as the second point is concerned it seems to me that the contention of Mr. Gopal Singh is correct and that the High Court was in error in setting aside the order of the Magistrate. The two cases upon which reliance was placed before the High Court arose under section 81 of the Punjab Municipal Act (III of 1911) which runs thus :

" Any arrears of any tax, water-rate, rent, fee or any other money claimable by a committee under this Act may be recovered on an application to Magistrate. "

According to the Lahore High Court the operation of this section was controlled by the words ' claimable by a committee under this Act ' and that it was not any sum that could be described as rent or fee which could be recovered under summary provisions of that section. According to that High Court only a sum that was claimable by the Committee under the express provisions of that Act would be recovered by resort to summary procedure provided by that section. In *Banarsi Das's case*¹, it was similarly held that the expression " recoverable by the Cantonment Authority under the Act " did not include money due under an ordinary contract between the Cantonment Authority and others and that section 259 of the Act applied only to such monies as were recoverable by that authority under express provisions of the Act. It is this last decision which was relied upon by the High Court and it pointed out that though the word rent did not occur in section 259 of the Act as it stood when *Banarsi Das's case*¹, was decided the introduction of that word had not altered the position in so far as recovery of rent in concerned.

Section 259 of the Act as it now stands runs thus :

" Notwithstanding anything elsewhere contained in this Act, arrears of any tax, rent on land and buildings and any other money recoverable by a Board or a Military Estates Officer under this Act or the Rules made thereunder may be recovered together with the cost of recovery either by a suit or on application to a Magistrate having jurisdiction in the cantonment or in any place where the person from whom such tax, rent or money is recoverable may for the time being be residing, by the distress and sale of any movable property of, or standing timber or growing crop belonging to such person which is within the limits of such Magistrate's jurisdiction, and shall, if payable by the owner of any property as such, be a charge on the property until paid for. "

Then there is a proviso which need not be quoted. The aforesaid section deals with " Method of recovery ". It sets out two methods : one is institution of a suit and the other is making of an application to a Magistrate. Therefore, where rent of land or building under the management of the Cantonment Authority falls to be recovered resort could be had either to a suit or to summary proceedings as provided in the section. But if the expression " rent " is confined to money due under some express provision of the Act it will lead to a curious result. Thus in respect of rent of land or buildings under the management of the Board neither remedy would be available—though the claim for the rent is ultimately traceable to those provisions of the Act and the Rules which empower the Board to let out the land or buildings—upon the ground that it cannot be said to be claimable or recoverable under any

express provision of the Act. Surely the Legislature could never have meant that even a suit for recovery of rent would be maintainable at the instance of the Board only if it was for the purpose of recovery of rent from a tenant who was liable under an express provision of the Act or the Rules to pay rent to the Board. Under sections 116 and 116-A of the Act, read along with Cantonment Land Administration Rules, 1937, the Cantonment Board is entrusted with certain duties and is empowered to do certain acts in relation to the Cantonment property under its management. It is the duty of the Board, among other things, to maintain and develop the property vested in or entrusted to its management. Section 116-A provides as follows :

“ A Board may, subject to any conditions imposed by the Central Government, manage any property entrusted to its management by the Central Government on such terms as to the sharing of rents and profits accruing from such property as may be determined by Rules made under section 280 .”

The Cantonment Land Administration Rules, 1937, contain detailed provisions as to the leasing of land, standardisation of rents, disposal of land by a private agreement, execution of leases etc. Powers are thus conferred upon the Board to let out property vested in it or which is under its management. It would follow from this that where in exercise of these powers the Board has let out any land or buildings it has the right as well as the duty to collect the rent from the tenant. Therefore, though strictly speaking, the rent due from the tenant cannot be said to be payable under any express provision of the Act the tenant's liability to pay and the Board's right to recover it is ultimately traceable to the Act inasmuch as this liability has arisen by reason of the exercise of a power exercised or performance of a duty by the Board under express provision of the Act and the Rules. Surely the Board cannot be deprived of the right to recover the rent or be absolved from the duty to recover it by resort to the normal remedy of a suit. Yet upon the interpretation placed upon section 259 of the Act by the Lahore High Court and by the Court below a suit as well as a proceeding before a Magistrate have to be placed on the same footing. This will lead to an impossible position and it cannot for one moment be thought that this is what the Legislature had intended. What the expression “ recoverable by a Board or the Military Estates Officer under this Act or the Rules made thereunder ” means is what the Act or the Rules permit the Board to recover or what the Act or the Rules permit the Military Estates Officer to recover. To put it in another way the words “ recoverable by ” and “ under this Act or the Rules made thereunder ” are meant to govern “ a Board ” or “ a Military Estates Officer ”. It was necessary to make this provision because certain duties are imposed and powers conferred on the Board and certain other duties imposed and powers conferred upon the Military Estates Officer and the section makes it clear that the power to recover money is exercisable by such of these two authorities as performs the duty or exercises the powers by reason of which the liability of another to pay the tax, rent or any other money arises.

In support of the view which I have expressed I may refer to a decision of the Court of Appeal in *Tideway Investment and Property Holdings Ltd. v. Wellwood*¹. There one of the questions which had to be considered related to awarding costs to the successful plaintiffs who were the landlords of the defendants. The suit was brought in the High Court and the plaintiffs contended that since the defendant had committed a breach of the provisions of the lease they had forfeited it and therefore, were entitled to possession on forfeiture as also to damages for breach of the Contract Acts and Harman, J., who heard the case held that the lease having already expired there could be no forfeiture and the tenant who was holding over became a statutory tenant entitled to the protection of the Rent Acts. Evershed, M. R., however, said that the tenant became a trespasser or a statutory tenant and that the breach of the covenant was a continuing one. Therefore, he said, it was plain that all the claims arising out of the breach of the covenant and consisting primarily of a claim for possession must be regarded as arising out of or under the

Rent Restriction Act, 1920. Harman, J., also held that the claim must be regarded as claims *under* the Rent Act and section 17 (2) precluded him from awarding cost to the successful plaintiffs. Section 17 (2) reads thus :

"A County Court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a County Court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the County Court, he shall not be entitled to recover any costs "

The Master of the Rolls, with whom the other Lords Justice agreed, took the same view as Harman, J. It may be mentioned that the suit was not instituted under any specific provision of the Rent Acts and the claims for possession was based on the breach of a covenant in the lease which the Court of Appeal treated as a continuing one and yet was treated as one under the Rent Restriction Act, 1922 because of the defence raised. This case thus illustrates that an expression such as the one found in section 259 of the Act must be construed liberally and not narrowly. In Stroud's Judicial Dictionary, Volume I, an Australian case, *Winstone v. Wurlitzer Automatic Phonograph Co. of Australia Private Ltd.*¹ on which I could not lay my hands is cited. There it was held 'that authorise' should be read in its ordinary sense of sanction, approve or countenance. I do not think that there is any substantial difference between "authorised by the Act" and "under the Act."

It would, therefore, be not right to construe the section in the way it was construed by the Court below. On the other hand it must be held that where the liability to pay money arises against a person by reason of something done by the Board or the Military Estates Officer in exercise of a power or the performance of a duty under the Act that liability can be enforced by the authority concerned either by instituting the suit or by making an application to a Magistrate.

Further, if the word 'rent' in section 259 of the Act were to be given a restricted meaning that word itself would be rendered otiose because there is no provision whatsoever in the Act which expressly makes rent claimable or recoverable by either of the two authorities specified thereon. Our attention was drawn to section 257 (1) which without its proviso reads thus :

"If any such notice as is referred to in section 256 has been given to any person in respect of property of which he is the owner, the Board may require any occupier of such property or of any part thereof to pay to it, instead of to the owner, any rent payable by him in respect of such property, as it falls due, up to the amount recoverable from the owner under section 256 :"

It cannot, however, be said that what the Legislature had in contemplation when it amended section 259 by adding the word "rent" therein was "rent" to which reference is made in section 257 (1). Section 257 is complementary to section 256. What section 256 provides is as follows :

"In the event of non-compliance with the terms of any notice, order or requisition issued to any person under this Act, or any Rule or Bye-law made thereunder, requiring such person to execute any work or to do any act, it shall be lawful for the Board, whether or not the person in default is liable to punishment for such default or has been prosecuted or sentenced to any punishment therefor, after giving notice in writing to such person, to take such action or such steps as may be necessary for the completion of the act or work required to be done or executed by him, and all the expenses incurred on such account shall be recoverable by the Board."

Therefore, what the Board has the power to recover from the person is the expense which it has incurred. One of the modes is to proceed against the occupier of any property belonging to the owner thereof and require that occupier to pay to the Board instead of to the owner the rent payable by him to the owner. What the Board thus recovers from the person cannot obviously be regarded as rent in so far as the Board is concerned. For, the Board is not the landlord of the occupier and what it recovers from him is not something which was due to the Board as rent from him. 'Rent' as commonly understood and as defined in Jowitt's 'Dictionary of English Law' is a sum of money payable periodically by a tenant to a landlord

as compensation for occupation of a building or land belonging to the landlord. It cannot thus include money payable by one person to another when they do not stand in the relationship of tenant and landlord. It is the Dictionary meaning which has to be given to the word 'rent' section in 259. Giving it this meaning it would be clear that what is referred to in section 275 (1) as rent was not intended to be included in that expression in section 259.

Apart from section 257 no other provision has come to our notice which can support the view of the High Court as to the interpretation of section 259. It may be mentioned that before the year 1940 there was rule 42 in the Cantonment Land Administration Rules, 1937, which expressly authorised the Board to recover all arrears of rent and "other payments" under the Rules by resorting to section 259 of the Act. But that rule was repealed in 1940. It was represented to us by Mr. Gopal Singh that this was repealed because in view of the wide language of section 259 there was no need felt for the retention of the rule. Whatever that may be, the position is, if I may repeat, that if the word rent is given a restricted meaning as has been done by the High Court, that word would become purposeless. On the other hand if the expression is interpreted in the way suggested here it will serve a purpose for which it was intended.

For these reasons I am of the view that the appeal should be allowed.

ORDER OF THE COURT :—In accordance with the opinion of the majority the appeal is dismissed.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Kesoram Industries & Cotton Mills, Ltd.

.. *Appellant**

v.

Commissioner of Wealth-tax (Central), Calcutta

.. *Respondent.*

Wealth-tax Act (XXVII of 1957), sections 2 (m), 7 (1), 2—Wealth-tax—Global valuation method—Assets written up by assessee in balance-sheet—No evidence of over-valuation—Assessment based on balance-sheet figures—Whether incorrect.

Income-tax Act (XI of 1922), sections 3, 67-B—Income-tax—Liability—When arises—Date of assessment or of previous year?—Scheme of Income-tax Act and Finance Act.

A company re-valued its fixed assets in its balance-sheet as on 31st March, 1950, and the same was adopted in subsequent balance-sheets, less depreciation calculated on the original cost. In the balance-sheet as on 31st March, 1957, was exhibited, among other things, the fixed assets as re-valued, as well as the amount proposed by the Board of Directors to be distributed as dividends and a provision for income-tax for the accounting year. In the wealth-tax assessment for the relevant assessment year 1957-58, the company claimed that the balance-sheet value of the fixed assets should not be taken as their value for purposes of assessment, that deduction must be given for proposed dividends and provision for taxation as "debts owed" on the valuation date. These claims were rejected. On Reference, the High Court upheld the views of the Department. On appeal to the Supreme Court,

Held, by majority (Subba Rao and Sikri, JJ).—The Officer is justified in taking the figures disclosed in the balance-sheet of the assessee as the valuation of its assets.

Under section 211 of the Companies Act every balance-sheet of a Company must give a true and fair view of the state of its affairs at the end of the financial year. It was open to the Officer to accept the figure disclosed in the balance-sheet as the value of the assets as on the valuation date, in the absence of any attempt on the part of the assessee to show that such figure was inflated for acceptable reasons.

Held further that a proposal by the Board of Directors to distribute an amount as dividends to the shareholders and incorporated as a report to the balance-sheet as required under section 217 of the Companies Act, is only a recommendation. Till the company in its general body meeting accepts the recommendation and declares a dividend, the sum proposed to be distributed as dividend as made by the directors on the valuation date, would not be debts owed within the meaning of section 2 (m) of the Wealth-tax Act, and cannot be deducted in the computation of the net wealth.

Also held that, the liability to pay income-tax is a debt within the meaning of section 2 (m) of the Wealth-tax Act and it arises on the valuation date during the accounting year. It is a present liability though it becomes payable after it is quantified in accordance with ascertainable data furnished by the Finance Act. There is a perfect debt at any rate on the last day of the accounting year and not a contingent liability. If the Finance Act is passed, it is the rate fixed by that Act if the Finance Act is not passed yet, it is the rate proposed in the Finance Bill pending before Parliament or the rate in force in the preceding year, whichever is more favourable to the assessee.

The meaning of the expression "debt" may take colour from the provisions of concerned Act, It may have different shades of meaning. But the following definition is unanimously accepted. "A debt is a sum of money which is now payable or will become payable in future by reason of a present obligation; *debitum in praesenti, solvendum in futuro*". A liability depending upon a contingency is not a debt *in praesenti* or in future till the contingency happened. But if there is a debt the fact the amount is to be ascertained does not make it any the less a debt if the liability is certain and what remains is only the quantification of the amount.

A debt owed within the meaning of section 2 (m) of the Wealth-tax Act can be defined as liability to pay *in praesenti* or in future an ascertainable sum of money.

Per *Shah, J.* (dissenting).—Liability to be taxed is declared by the Income-tax Act, but the liability does not give rise to present obligation to pay a sum of money until the Finance Act becomes operative. Section 67-B of the Income-tax Act does not convert what is an inchoate liability on the valuation date i.e., on the last day of the previous year, into a complete or effective liability to pay tax. The provisions of the Statute cannot be ignored on what are called "business considerations" and existence of a liability to pay a debt which has not in law arisen cannot be assumed. The amount provided for taxes is not deductible.

Neither clause (a) nor clause (b) of section 7 (a) of the Wealth-tax Act is directed towards the determination of the net wealth and it would be impossible to hold that the Legislature intended that the net wealth for the purpose of the charge to tax under section 3 should be the net value of the assets as determined under sub-section (2) of section 7 of the Act.

Appeal from the Judgment and Order, dated the 14th May, 1962 of the Calcutta High Court in Wealth-tax Reference No. I/8 of 1960.

N. A. Palkhivala, and *S. T. Desai*, Senior Advocates (*R. K. Chaudhury*, *S. Murthy* and *B. P. Maheshwari*, Advocates, with them), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (*N. D. Karkhanis*, *R. N. Sachthey*, *B. R. G. K. Achar*, and *R. H. Dhebar*, Advocates with him), for Respondent.

The Court delivered the following Judgments.—

Subba Rao, J. (for himself and *Sikri, J.*)—Kesoram Industries and Cotton Mills Limited, the appellant herein, is a company incorporated under the Indian Companies Act. Its subscribed capital at the end of the relevant accounting year ending 31st March, 1957, was Rs. 2,29,99,125. The original cost of the said assets was Rs. 2,30,32,833. During the year ended 31st March, 1950, the company made a re-valuation of its assets and added an amount of Rs. 1,45,87,000 to the costs of the said fixed assets. After certain adjustments, the value of the fixed assets was fixed at Rs. 2,60,52,357. The said fixed assets of the assessee were shown in the balance-sheets issued by the assessee from time to time at the added value less depreciation calculated on the original cost. In the balance-sheet of the relevant accounting year also the said amount was shown as the value of the fixed assets. In the profit and loss account for the said year a sum of Rs. 15,29,855 was shown as the amount of dividend proposed to be distributed for that year. The said amount was declared as dividend at the General Body Meeting of the assessee held on 27th November, 1957. The said balance-

sheet as on 31st March, 1957, also showed a provision for taxation amounting to Rs. 1,03,69,009 and as against the said amount a sum of Rs. 84,76,690 was shown as the taxes paid during the said accounting year.

In computing the net wealth for the purposes of Wealth-tax Act, 1957, the Wealth-tax Officer accepted the said valuation of the fixed assets under section 7 (2) of the said Act, rejecting the plea of the assessee that each item of the assets should be valued at the market rate under section 7 (1) thereof. He also disallowed the claim of the assessee in respect of the proposed dividend and estimated income-tax and super-tax on the ground that the said items were not debts on the valuation date, i.e., 31st March, 1957, within the meaning of section 2 (m) of the Wealth-tax Act. On appeal, the said order was confirmed by the Appellate Assistant Commissioner except to the extent of outstanding demand of income-tax for Rs. 30,305. On further appeals, the Income-tax Appellate Tribunal, Calcutta Bench 'A' not only disallowed the claim of the assessee but also allowed the appeal of the Department in regard to Rs. 30,305 subject to certain direction given by it. At the instance of the assessee, the following three questions were referred to the High Court under section 27 of the Wealth-tax Act:

"(1) Whether, on the facts and in the circumstances of the case, the Wealth-tax Officer was justified in taking the value of the assets of the assessee as shown in the balance-sheet on the relevant valuation date?

(2) Whether, on the facts and in the circumstances of the case, in computing the net wealth of the assessee the amount of proposed dividend was deductible from its total assets?

(3) Whether, on the facts and in the circumstances of the case, in computing the net wealth of the assessee, the amount of the provision for payment of income-tax and super-tax in respect of the year of account was a debt owed within the meaning of section 2 (m) of the Wealth-tax Act, 1957, and as such deductible in computing the net wealth of the assessee?"

The High Court answered the three questions against the assessee. Hence the present appeal.

Mr. Palkhivala, learned Counsel for the assessee, raised before us the same arguments as he had unsuccessfully pressed before the High Court. We shall take each of them *seriatim* for our consideration.

The first question is whether the High Court was right in agreeing with the Tribunal that the assessee's re-valuation of the assets should be accepted for the purposes of the Wealth-tax Act. Section 7 of the Wealth-tax Act lays down how the value of assets is to be ascertained for the purposes of the said Act. It reads :—

"(1) The value of any assets, other than cash, for the purposes of this Act, shall be estimated to be the price which, in the opinion of the Wealth-tax Officer it would fetch if sold in the open market on the valuation date.

(2) Notwithstanding anything contained in sub-section (1)—

(a) where the assessee is carrying on a business for which accounts are maintained by him regularly the Wealth-tax Officer may, instead of determining separately the value of each asset held by the assessee in such business, determine the net value of the assets of the business as a whole having regard to the balance-sheet of such business as on the valuation date and making such adjustments therein as the circumstances of the case may require."

Under this section in the case of an assessee carrying on business the Wealth-tax Officer may determine the net value of the assets of the business as a whole having regard to the balance-sheet of the business as on the valuation date. The balance-sheet as indicated earlier, as on 31st March, 1957, showed the appreciated value on re-valuation of the assets at Rs. 2,60,52,357. As the value of the assets had increased, a corresponding balancing figure, viz., Rs. 1,45,87,000 was introduced in capital reserve surplus: that figure represented the increase in the value of the assets. It was argued that the revaluation was done for other purposes, that it did not represent the real value of the assets and that that fact was also reflected by the said amount representing the difference being shown as a capital surplus. Apart from the argument raised, there is nothing on the record to disclose why the said figure did not represent the correct value of the assets. We do not also see how the fact that the said increase was shown as capital surplus would detract from the correctness of the valuation, for the corresponding balancing figure had to be introduced in the balance-

sheet. Under section 211 of the Companies Act, 1956, every balance-sheet of a company must give a true and fair view of the state of its affairs as at the end of the financial year. When the assessee himself has shown the net value of the assets at a figure, the Wealth-tax Officer, in our view, rightly accepted it, as no one could know better the value of the assets than the assessee himself. It was open to the assessee to convince the authorities that the said figure was inflated for acceptable reasons; but it did not make any such attempt. It was also open to the Wealth-tax Officer to reject the figure given by the assessee and to substitute in its place another figure, if he was, for sufficient reasons, satisfied that the figure given by the assessee was wrong. But he did not find any such reasons to do so. When he accepted the figure shown by the assessee himself, he did the right thing and there is nothing to complain about. The High Court was right in answering the first question in the affirmative.

The second question does not call for a detailed scrutiny. Under section 2 (m) of the Wealth-tax Act, "net wealth" means the amount by which the aggregate value computed in accordance with the provisions of the said Act of all the assets of the assessee on the valuation date is in excess of the aggregate value of all the debts owed by the assessee on the said date. The Directors of the assessee-company showed in the profit and loss account a sum of Rs. 15,29,855 as the amount of dividend proposed to be distributed for the year ending 31st March, 1957; but the said dividend was declared by the company at its General Body Meeting only on 31st March, 1957. The question is whether the amount set apart as dividend by the Directors was a debt owed by the company on the valuation date.

The Directors cannot distribute dividends but they can only recommend to the General Body of the Company the quantum of dividend to be distributed. Under section 217 of the Indian Companies Act, there shall be attached to every balance-sheet laid before a company in general meeting a report by its board of directors with respect to, *inter alia*, the amount, if any, which it recommends to be paid by way of dividend. Till the company in its general body meeting accepts the recommendation and declares the dividend, the report of the directors in that regard is only a recommendation which may be withdrawn or modified, as the case may be. As on the valuation date nothing further happened than a mere recommendation by the directors as to the amount that might be distributed as dividend, it is not possible to hold that there was any debt owed by the assessee to the shareholders on the valuation date. The High Court rightly answered the second question in the negative.

The third question raised a serious controversy between the parties. On this question the High Court held that although the assessee was liable to pay income-tax on the valuation date, the actual amount of the liability was not ascertained until some time after the passing of the Finance Act and determination made by the Income-tax authorities and, therefore, no debt was owed by the assessee on the valuation date. In that view, it answered the third question in the negative.

A few facts relevant to this question may be recapitulated. Under the Wealth-tax Act, 1957, the Wealth-tax Officer valued the net wealth of the assessee as on 31st March, 1957, which was the valuation date as defined under the said Act. The Finance Act came into force on 1st April, 1957. The question is whether the liability to pay income-tax and super-tax became a debt owed by the assessee on 31st March, 1957, or on 1st April, 1957; if it was a debt on the latter date, it could not be deducted from the gross assets of the assessee to arrive at the net wealth, if it was on the former date, it could be. Mr. Palkhivala argued that the liability to pay tax arose by virtue of the charging section *i.e.*, section 3 of the Income-tax Act, and that it arose not later than the close of the previous year though the quantification of the amount payable was postponed till the Finance Act was passed and that, therefore, it being a liability *in praesenti* existing on the valuation date, it was a debt owed by the assessee on the said date. Mr. A. V. Viswanatha Sastri, learned Counsel for the Revenue, argued that the expression "debt owed" meant an obligation to pay an ascertained amount, that the said obligation to pay income-tax arose only on the passing of the Finance Act and that, therefore, on the valuation date no

debt was owed by the assessee to the Department within the meaning of section 2 (m) of the Wealth-tax Act.

At the outset it will be convenient to gather the material provisions of the relevant Acts at one place. They read :—

WEALTH-TAX ACT, 1957.

“Section 2 (m) :—‘net wealth’ means the amount by which the aggregate value computed in accordance with the provisions of this Act of all the assets, wherever located, belonging to the assessee on the valuation date, including assets required to be included in his net wealth as on that date under this Act, is in excess of the aggregate value of all the debts owed by the assessee on the valuation date.....”

Section 3 :—Subject to the other provisions contained in this Act there shall be charged for every financial year commencing on and from the first day of April, 1957, a tax (hereinafter referred to as wealth-tax) in respect of the net wealth on the corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in the schedule.

Section 2 (g) :—‘valuation date’ in relation to any year for which an assessment has to be made under this Act, is the last day of the previous year as defined in clause (11) of the section 2 of the Income-tax Act if an assessment were to be made under that Act for that year.....”

INCOME-TAX ACT, 1922.

“Section 2 (11) ‘previous year’ means—

(i) in respect of any separate source of income, profits and gains—

(a) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then, at the option of the assessee, the year ending on the date to which his accounts have been so made up.

Section 3.—Where any Central Act enacts that income-tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually.

Section 55—In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, local authority, unregistered firm or other association of persons, not being a registered firm or the partners of the firm or members of the association individually, an additional duty of income-tax (in the Act referred to as super-tax) at the rate or rates laid down for that year by a Central Act.

Section 67-B.—If on the 1st day of April in any year provision has not yet been made by a Central Act for the charging of income-tax for that year, this Act shall nevertheless have effect until such provision is so made as if the provision in force in the preceding year or the provisions proposed in the Bill then before Parliament, whichever is more favourable to the assessee, were actually in force”

THE FINANCE (No. 2) ACT, 1957 (XXVI OF 1957).

It received the assent of the President on 11th September, 1957.

Section 2—(1) Subject to the provisions of sub-sections (2), (3), (4) and (5) for the year beginning on the 1st day of April, 1957,—

(a) income-tax shall be charged at the rate specified in Part I of the First Schedule, and in the cases to which Paragraphs A, B and C of that Part apply, shall be increased by a surcharge for purposes of the Union and a special surcharge on unearned income calculated in either case in the manner provided therein; and

(b) super-tax shall, for the purposes of section 55 of the Indian Income-tax Act, 1922 (XI of 1922) (hereinafter referred to as the Income-tax Act) be charged at the rates specified in Part II of the First Schedule

A gist of the said provisions, excluding the controversial points, relevant to the assessment under scrutiny may be given thus : Under section 3 of the Wealth-tax Act, the net wealth of the assessee was assessable as on the valuation date, i.e., 31st March, 1957, at the rate or rates specified in the Schedule to the said Act “Net wealth” is the amount by which the aggregate value of the assets of the assessee as on the said date is in excess of the aggregate value of the debts owed by it on the said date. Under section 3 of the Income-tax Act, the assessee was liable to pay income-tax and super-tax on its income ascertained during the accounting year ending with 31st March, 1957, at the rates prescribed under the Finance Bill or the previous

Finance Act whichever was less, as the Finance Act of 1957 was passed only in September, 1957. On those facts, the question is whether the liability of the assessee to pay income-tax and super-tax arose on the valuation date, i.e., 31st March, 1957, the last day of the accounting year, or subsequently during the assessment year, i.e., during the period 1st April, 1957 to 31st March, 1958.

Looking at the problem from the standpoint of a businessman or looking at the question from a common sense view, one will reasonably hold that the net wealth of an assessee during the accounting year is the income earned by him minus the tax payable by him in respect of that income. If a person earns Rs. 1,00,000 during the accounting year and has to pay Rs. 60,000 as tax in respect of that income, it will be incongruous to suggest that his wealth at the end of that year is Rs. 1,00,000. A reasonable man will say that his income is only Rs. 40,000 which represents his wealth at the end of the year. But it is said that what is just is not always legal. This Court has, on more than one occasion, emphasised the fact that the real income of an assessee has to be ascertained on commercial principles subject to the provisions of the Income-tax Act. Is there any provision in the Wealth-tax Act which compels us to come to a conclusion which is unjust on the face of it?

The problem presented can satisfactorily be solved by answering two questions namely: (1) What does the expression "debt owed" mean? and (2) When does the liability to pay income-tax and super-tax under the Income-tax Act become a debt owed within the meaning of that expression?

If we ascertain the meaning of the word "debt" the expression "owed" does not cause any difficulty. The verb "owe" means "to be under an obligation to pay." It does not really add to the meaning of the word "debt". What does the word "debt" mean? A simple but a clear definition of the word is found in *Webb v. Stenton*¹, wherein Lindley, L.J., said:

"..... a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in praesenti, solvendum in futuro*."

This view was accepted by the other Lord Justices. The Court of Appeal in *O' Discoll v. Manchester Insurance Committee*², considered the word "debt" in the context of fees payable by National Insurance Committee to the panel doctor. The Insurance Committee entered into agreements with the panel doctors of their district by which the whole amounts received by the committee from the National Insurance Commissioners were to be pooled and distributed among the panel doctors in accordance with a scale of fees. The Court held that where a panel doctor had done work under his agreement with the Insurance Committee, and the committee had received funds in respect of medical benefit from the National Insurance Commissioners, there was a debt owing or accruing from the Insurance Committee to the panel doctor which might be attached, though the exact share payable to him was not yet ascertained. It was argued there that there could not be debt until the amount had been ascertained and in support of that contention cases relating to unliquidated damages were cited. Distinguishing those cases on the ground that there was no debt until the verdict of the jury was pronounced assessing the damages and judgment was given, Swinfen Eady, L. J., observed:—

"here there is a debt, uncertain in amount, which will become certain when the accounts are finally dealt with by the Insurance Committee. Therefore, there was a 'debt' at the material date though it was not presently payable and the amount was not ascertained."

Phillimore, L. J., dealing with the argument based on the fact that the sums were not ascertained at the time they were sought to be attached, observed:

"No doubt these debts were not presently payable, and the amounts were not, on 9th April, 1914, ascertained in the sense that no one could say what the result of the calculations would be but it was certain on that date that a payment would become due from the committee to the doctors out of the balance of the moneys in the hands of the committee for 1913....."

So also Bankes, L. J., observed:

"Dr. Sweeney fulfilled that condition, and a debt arose, though the amount of it was not ascertained on 9th April, 1914, and was not then payable."

1. (1883) L.R. 11 Q.B.D. 518, 527.

2. L.R. (1915) 3 K.B.D. 499, 512, 515, 517..

This judgment in substance ruled that a present liability to pay an amount in future, though it was not ascertained but was ascertainable, was a debt liable to attachment.

The word "debt" was again considered in *Inland Revenue Commissioners v. Bagnall Ltd.*¹, in connection with the excess profits tax. There, the Board of Inland Revenue accepted an offer of £10,000 made by the respondent-company's accountants in settlement of their earlier liability. That offer was accepted only on 22nd September, 1937. The company contended that the sum was a debt due from the respondent to the Inland Revenue as from 1st January, 1935. As the offer was not accepted, it was held that the sum was not a debt. It was argued that even if there was a liability on 1st January, 1935, that liability did not become a debt within the meaning of the Finance (No. 2) Act, 1939. Adverting to that argument, Macnaghten, J., observed :—

"It is true that the word 'debt' may, in certain connections, be used so as to cover a mere liability, but I think that in this Act it is used in the proper sense of an ascertained sum and that the contention of the Attorney-General is well founded."

This decision, while holding that in the context of the Finance Act of 1939 there was no debt until the liability was quantified, conceded that the expression "debt" was wide enough to take in a liability; it also did not define the scope of the expression "ascertained" that is to say whether the said expression would take in amounts ascertainable.

The King's Bench Division in *Seabrook Estate Co., Ltd. v. Ford*², held that money in the hands of a Receiver for debenture-holders was not a debt owing or accruing and, therefore, was not liable to attachment. But Hallett, J., accepted the following proposition laid down by Rowlatt, J., in *O'Driscoll v. Manchester Insurance Committee*.³

"..... where a debt is established *in praesenti*, it is not sufficient objection to say that the exact amount of the debt will be the subject of a calculation which has not yet been made and, it may be, cannot yet be made."

This question fell to be decided again in *Dawson v. Preston (Law Society, Garnishee)*⁴. The question there was whether sum representing damages paid to legal aid fund could be attached by a creditor of a legally aided plaintiff. At the time when the garnishee order was sought to be issued, a part of the decree amount was with the Law Society, subject to any charge conferred on the Law Society to cover the prescribed deductions which remained to be quantified, e.g., deduction for the taxed costs of the action. The Court held that there was an existing debt although the payment of the debt was deferred pending the ascertainment of the amount of the charge in favour of the Law Society, Ormerod, J., observed :—

"..... that is merely a question of ascertaining the debt which has to be paid over to the assisted person and does not prevent that debt from being an existing debt at the material date."

This decision also recognised that, if there was a liability *in praesenti* the fact that the amount was to be ascertained did not make it any the less a debt.

In *Dunlop & Ranken Ltd. v. Hendall Steel Structures Ltd. (Pitchers Ltd., Garnishees)*⁵ it was held that the issuing of the architect's certificate was just as much a necessity for investing a cause of action in sub-contractors as it was in the main contracts, and the judgment-debtors had no right to be paid, and therefore, there was no debt, until the architect had certified the amount to be paid for the work ordered by the garnishees. On that reasoning it was held that no garnishee order should have been made. Strong reliance was placed on this decision in support of the contention of the Revenue that there could not be a debt if the ascertainment of the debt depended upon a certificate to be issued by a third party. But a perusal of the judgment shows that in such contracts a certificate by the architect was a condition for imposing a liability and that, therefore, till such a condition was complied with there could

1. (1944) 1 All E.R. 204, 206.

2. (1949) 2 All E.R. 94, 96

3. (1915) 3 K.B.D. 499, 512, 515, 517.

4. (1955) 3 All E.R. 314, 318.

5. (1957) 1 W.L.R. 1102, 1104.

not be any debt. This decision does not throw any light on the question that now arises before us. The principle of the matter is well put in the Annual Practice, 1950, at p. 808, thus :—

“...but the distinction must be borne in mind between the case where there is an existing debt, payment whereof is deferred, and a case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not. If for instance, a sum of money is payable on the happening of a contingency, there is no debt owing or accruing. But the mere fact that the amount is not ascertained does not show that there is no debt.”

In our view this is a full and accurate statement of law on the subject and the said statement is supported by English decisions we have discussed earlier.

We shall now notice some of the decisions of the Indian Courts on this aspect.

A special Bench of the Madras High Court in *Sabju Sahib v. Noordin Sahib*¹, held that a claim for unliquidated sum of money was not a debt within the meaning of the Succession Certificate Act, 1889, section 4 (1) (a). The claim was to have an account taken of the partnership business that was carried on between the deceased and others and to have the share of the deceased paid over to him as the representative of the deceased. Shephard, *Officiating Chief Justice* said :—

“It is quite clear that this is not a debt, for there was at the time of the death no present obligation to pay a liquidated sum of money. The claim is one about which there is no certainty ; it may turn out that there is nothing due to the plaintiff.”

Subramania Ayyar, J., did not consider that claim as a debt for the reason that the liability arising from the obligation of a partner to account to the other partners could not be held to be a debt in the accepted ordinary legal sense of the term for the obvious reason that the liability was not in respect of a liquidated sum. An obligation to account does not give rise to a debt, for the liability to pay will arise only after the accounts were taken and the liability was ascertained. In the context of the Succession Certificate Act, such an obligation was rightly held not to be a debt.

The decision of a Full Bench of the Calcutta High Court in *Banchharam Majumdar v. Adyanath Bhattacharjee*², throws considerable light on the connotation of the word ‘debt’. Jenkins, C.J., defined that word thus :—

“.....I take it to be well established that a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation.”

Mookerjee, J., quoted the following passage with approval from the Judgment of the Supreme Court of California in *People v. Arguello*³ :

“Standing alone, the word ‘debt’ is as applicable to a sum of money which has been promised, at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds : *solvendum in praesenti* and *solvendum in futuro*..... A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened.”

This passage brings out with clarity the essential characteristics of a debt. It also indicates that a debt owing is a debt payable in future. It also distinguishes a debt from a liability for a sum payable upon a contingency.

A Full Bench of the Madras High Court in *Doraisami Padayachi v. Vaithilinga Padayachi*⁴, ruled that :—

“a promise to pay the amount which may be found due by an arbitrator on taking accounts between the parties is not a promise to pay a ‘debt’ within the meaning of section 25 of the Indian Contract Act, 1872, the amount not being a liquidated sum”.

This was because the liability to pay the amount arose only after the arbitrator decided that a particular amount was due to one or other of the parties.

1. (1899) I.L.R. 22 Mad. 139, (S.B.) 141.

3. (1869) 37 Calif. 524.

2. (1909) I.L.R. 36 Cal. 936, 938, 939, 941.

4. (1917) I.L.R. 40 Mad. 31 : 32 M.L.J. 422.

13 C.W.N. 966 : 10 C.L.J. 180 (F.B.).

The Calcutta High Court in *Jabed Saikh v. Taher Mallik*¹, held that :—

“ a liability for *mesne* profits under a preliminary decree therefor, though not a contingent liability, does not become a ‘debt’ till the amount recoverable, if any, is ascertained and a final decree for a specified sum is passed.”

That conclusion was arrived at on the basis of the principle that a claim for damages does not become a debt till the judgment is actually delivered.

We have briefly noticed the judgments cited at the Bar. There is no conflict on the definition of the word ‘debt’. All the decisions agree that the meaning of the expression ‘debt’ may take colour from the provisions of the concerned Act : it may have different shades of meaning. But the following definition is unanimously accepted :

“ a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation : *debitum in praesenti, solvendum in futuro* ”.

The said decisions also accept the legal position that a liability depending upon a contingency is not a debt *in praesenti* or *in futuro* till the contingency happened. But if there is a debt the fact that the amount is to be ascertained does not make it any the less a debt if the liability is certain and what remains is only the quantification of the amount. In short, a debt owed within the meaning of section 2 (m) of the Wealth-tax Act can be defined as a liability to pay *in praesenti* or *in futuro* an ascertainable sum of money.

With this background let us look at the provisions of the Income-tax Act and the decisions bearing on them to ascertain whether a liability to pay income-tax and super-tax on the income of the accounting year is a debt within the meaning of section 2 (m) of the Wealth-tax Act. 2

The first question is, whether section 3 of the Indian Income-tax Act, 1922, or section 2 of the Finance (No. 2) Act, 1957, is the charging section. The Revenue contends that the Finance Act is the charging section and that, therefore, the liability accrued only on the first day of April, 1957, while the assessee says that section 3 of the Income-tax Act is the charging section and that the Finance Act only prescribed the rate of tax payable.

Uninfluenced by judicial decisions let us at the outset look at the relevant provisions of the two Acts. Under section 3 of the Income-tax Act where any Central Act enacts that income-tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of the said Act. The expression “charged” is used both in the case of the Central Act *i.e.*, the Finance Act, and the Income-tax Act. It could not have been the intention of the Legislature to charge the income to income-tax under two Acts. Necessarily, therefore, they are used in two different senses. The tax is to be charged for that year in accordance with, and subject to, the provisions of the Income-tax Act ; but the said charge will be in accordance with the rates prescribed under the Finance Act. This construction will harmonise the apparent conflict between the two Acts. When you look at section 2 of the Finance Act, it shows that income-tax shall be charged at the rates specified in Part I of the First Schedule, and super-tax for the purpose of section 55 of the Income-tax Act, 1922, shall be charged at the rates specified in Part II of the First Schedule. The primary object of the Finance Act is only to prescribe the rates so that the tax can be charged under the Income-tax Act. The Income-tax Act is a permanent Act, whereas the Finance Act is passed every year and its main purpose is to fix the rates to be charged under the Income-tax Act for that year. That should be the construction is also made clear by section 55 of the Income-tax Act, whereunder super-tax shall be charged for any year in respect of the total income of the previous year of any individual, Hindu undivided family company etc at the rate or rates laid down for that year by a Central Act.

This section brings out the distinction between a tax charged and the rate at which it is charged. This construction is also emphasized by section 67-D of the

Income-tax Act, whereunder if on the 1st day of April in any year provision has not yet been made by a Central Act for the charging of Income-tax for that year, the Income-tax Act shall nevertheless have effect until such provision is so made as if the provision is in force in the preceding year or the provision proposed in the Bill then before Parliament, whichever is more favourable to the assessee, was actually in force. This shows that the charging section is only section 3 of the Income-tax Act and that section 2 of the Finance Act only gives the rate for quantifying the tax; for, this section gives an alternative for quantification in the contingency of the Finance Act not having been made on the 1st day of April, of that year. Even if such an Act was made, the charge under the Income-tax Act could be imposed and worked out only in terms of the provisions of the Income-tax Act. If that be the construction, the conclusion will flow that the tax liability at the latest will arise on the last day of the accounting year.

The decisions cited at the Bar though at the first blush appear to be conflicting, they do not in effect run counter to the said conclusion.

The first decision is that of the Judicial Committee in *Commissioner of Income-tax v. Western India Turf Club Ltd.*¹ Therein, the Judicial Committee held that the rate of super-tax payable by a company fixed by the Finance Act would apply, though an incorporated association was formed into a company only on 1st April, 1925. In that connection the Board, adverting to the argument that the rate should have been only that applicable to an unincorporated association observed:

"The argument which has been used in favour of the appeal seems to involve the fallacy that liability to tax attached to the income in the previous year. That is not so. No liability to tax attached to the income of this company until the passing of the Act of 1925, and it was then to be taxed at the rate appropriate to a company."

The observations appear to be rather wide. Be that as it may, the subsequent decisions of the Judicial Committee made it abundantly clear that the liability to tax arises during the accounting year though its quantification is postponed to a later date.

In *Maharaja of Pithapuram v. Commissioner of Income-tax, Madras*², the Privy Council explained the scope of section 3 of the Income-tax Act, 1922. Lord Thankerton, speaking for the Board, laid down two principles, namely:—

(i) "under the express terms of section 3 of the Indian Income-tax Act, 1922, the subject of charge is not the income of the year of assessment, but the income of the previous year; and (ii) the Indian Income-tax Act, 1922, as amended from time to time, forms a code, which has no operative effect except so far as it is rendered applicable for the recovery of tax imposed for a particular fiscal year by a Finance Act."

A combined reading of the said two principles leads to the position that though the Income-tax Act has no operative effect till the Finance Act is passed, after the passing of the said Act, the charge to tax would be under the Income-tax Act in terms of the relevant provisions of the said Act. In *Doorga Prosad v. The Secretary of State*³, the Judicial Committee held that income-tax was calculated and assessed by reference to the income of an assessee for a given year, but it was due when demand was made under sections 29 and 45 of the Income-tax Act. The Judicial Committee in that decision was not considering the question of liability to pay income-tax but only the payability.

The Federal Court in *Chhatturam v. Commissioner of Income-tax, Bihar*⁴ after considering the relevant English decisions, held that the liability to pay tax was founded on sections 3 and 4 of the Income-tax Act, which were the charging sections. It quoted with approval the observations of Sargent, L.J., in *Williams v. Henry Williams Ltd.*⁵, wherein the learned Judge held that the liability was definitely

1. (1927) L.R. 55 I.A. 14, 17 : 54 M.L.J. 1. A.I.R. 1928 P.C. 1.

2. (1945) 13 I.T.R. 221, 223 : L.R. 72 I.A. 141 : (1945) 2 M.L.J. 11 : I.L.R. (1946) Mad 1. A.I.R. 1945 P.C. 89.

3. (1945) 13 I.T.R. 285 : L.R. 72 I.A. 114 :

I.L.R. (1945) 2 Cal. 1 : 80 C.L.J. 13 : A.I.R. 1945 P.C. 62.

4. (1947) 15 I.T.R. 302, 308 : (1947) F.L.J. 92 : (1947) 2 M.L.J. 432 : (1947) F.C.R. 116 : A.I.R. 1947 F.C. 32.

5. Not reported.

and finally created by the charging section and the subsequent provisions as to assessment and so on were machinery only for the purpose of quantifying the liability.

The Privy Council again in *Wallace Brothers & Co., Ltd., v. Commissioner of Income-tax, Bombay*¹, in clear terms expounded the scope of a tax liability under the Income-tax Act. It held that :

“the rate of tax for the year of assessment may be fixed after the close of the previous year and the assessment will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section alone, and it arises not later than the close of the previous year, though quantification of the amount payable is postponed.”

This decision clarifies what the Judicial Committee meant in *Maharaja of Pithapuram v. Commissioner of Income-tax, Madras*², when it said that the Income-tax Act, would come into operation after the Finance Act was passed. It was referring not to the liability but to the quantification of the amount under that Act.

This Court in *Chatturam Horliram, Ltd. v. Commissioner of Income-tax, Bihar*³ reviewed the legal position *vis-a-vis* the question of charge to income-tax under the Income-tax Act. The facts in that case were the assessee-company carrying on business in Chota Nagpur was assessed to tax for the year 1939-40 but the assessment was set aside by the Income-tax Appellate Tribunal on 28th March, 1942, on the ground that the Indian Finance Act, 1939, was not in force during the assessment year 1939-40 in Chota Nagpur which was a partially excluded area. On 30th June, 1942, a Regulation was promulgated by which the Indian Finance Act of 1939 was brought into force in Chota Nagpur retrospectively as from 30th March, 1939. Thereupon the Income-tax Officer made an order holding that the income of the assessee for the year 1939-40 had escaped assessment and issued to the assessee a notice under section 34 of the Income-tax Act. The validity of the notice was questioned. This Court, speaking through Jagannadhadas, J., held that though the Finance Act was not in force in that area in 1939-40, the income of the assessee was liable to tax in that year and, therefore, it had escaped assessment within the meaning of section 34 of the Income-tax Act. The reasons for that conclusion were given by the learned Judge thus :—

“ Thus, income is chargeable to tax independently of the passing of the Finance Act but until the Finance Act is passed no tax can be actually levied.”

The learned Judge also added :

“according to the scheme of the Act the quality of chargeability of any income is independent of the passing of the Finance Act.”

This Court, therefore, accepted the principle that the liability to pay tax arose under the Income-tax Act, though its quantification depended upon the passing of the Finance Act. If there was no liability under the Income-tax Act during the relevant accounting year, no question of escaped assessment during that year would have arisen in that case. The same principle was reiterated by this Court in *Kalwa Dabadattam v. Union of India*⁴. There, the question was whether the liability of a Hindu undivided family arose before or after partition of the family. In that case, this Court speaking through Shah, J. stated in clear terms thus :—

“ Under the Indian Income-tax Act liability to pay income-tax arises on the accrual of the income and not from the computation made by the taxing authorities in the course of assessment proceedings, it arises at a point of time not later than the close of the year of account ”

The learned Judge expressed his concurrence with the observations of the Privy Council in *Wallace Brothers & Co., Ltd. v. Commissioner of Income-tax*⁵, which we have extracted earlier.

1. (1948) 16 I.T.R. 240, 44 L.R. 75 I.A.
86 : (1948) 2 M.L.J. 62 : (1948) 1 F.C.R. 1 :
(1948) F.L.J. 32 : A.I.R. 1948 188
2. (1945) 2 M.L.J. 11 : I.L.R. (1945) 118.
L.R. 72 I.A. 141 : 13 I.T.R. 226 Mad 1 :
1945 P.C. 89. A.I.R.
3. (1955) 27 I.T.R. 709, 716 : (1955) 5
571 : I.L.R. (1955) Pat. 553 : (1955) 2 S.C.J.
R.

290 : A.I.R. 1955 S.C. 619
4 (1963) 49 I.T.R. 165, 171 : (1963) 2 I.T.J.
123 : (1963) 2 S.C.J. 256 : (1964) 3 S.C.R. 191
A.I.R. 1964 S.C. 880.
5 (1948) 2 M.L.J. 62 : (1948) F.C.R. 1
(1946) F.L.J. 32 : L.R. 75 I.A. 86 : 16 I.T.R.
240 : A.I.R. 1948 P.C. 118.

To summarise : A debt is a present obligation to pay an ascertainable sum of money, whether the amount is payable *in praesenti* or *in futuro* : *debitum in praesenti, solvendum in futuro*. But a sum payable upon a contingency does not become a debt until the said contingency has happened. A liability to pay income-tax is a present liability though it becomes payable after it is quantified in accordance with ascertainable data. There is a perfect debt at any rate on the last day of the accounting year and not a contingent liability. The rate is always easily ascertainable. If the Finance Act is passed, it is the rate fixed by that Act : if the Finance Act has not yet been passed, it is the rate proposed in the Finance Bill pending before Parliament or the rate in force in the preceding year, whichever is more favourable to the assessee. All the ingredients of a 'debt' are present. It is a present liability of an ascertainable amount.

Looking from a practical standpoint also, there cannot possibly be any difficulty in ascertaining the liability. As the actual assessment will invariably be made subsequent to the close of the accounting year, the rate would certainly be available to the authorities concerned for the purpose of quantification.

The High Courts of Bombay, Gujarat and Kerala have expressed conflicting views on this question. The Bombay High Court in *Commissioner of Wealth-tax, Bombay v. Standard Mills Co., Ltd.*¹, came to the conclusion that the point of time at which the tax got attached to the income and the tax was imposed on the person would be the passing of the Finance Act. A division Bench of the Gujarat High Court in *Commissioner of Wealth-tax, Gujarat v. Raipur Manufacturing Company, Limited*², held that the liability to income-tax arose under the Income-tax Act, that it accrued on the valuation date and did not arise for the first time when the Finance Act was passed. The Kerala High Court in *Commissioner of Wealth-tax, Kerala v. Travancore Rayons Limited*³, held that the said liability did not become a debt until 1st April, 1959, when the rate of tax for that accounting year would be available.

For the reasons we have stated earlier, we agree with the conclusion arrived at by the Gujarat High Court. We, therefore, hold that the liability to pay income-tax is a debt within the meaning of section 2(m) of the Wealth-tax Act and it arises on the valuation date during the accounting year.

We will close the discussion on this subject with the words of Earl Jowitt in *British Transport Commission v. Gourley*⁴ :

"The obligation to pay tax—save for those in possession of exiguous incomes—is almost universal in its application. That obligation is ever present in the minds of those who are called upon to pay taxes, and no sensible person any longer regards the net earnings from his trade or profession as the equivalent of his available income."

We are glad that our conclusion coincides with the current conception of net wealth in the commercial sense.

Mr. Palkivala, learned Counsel for the assessee, raised an alternative contention in regard to the manner of ascertaining the net wealth of an assessee carrying on a business based on section 7 (2) (a) of the Wealth-tax Act. The said section has already been extracted in the earlier stage of the judgment. The argument of Mr. Palkivala was that sub-section (2) of section 7 of the Wealth-tax Act provided an alternative method of valuation of the net wealth of an assessee who was carrying on a business, that the expression "net wealth of the assets of the business as a whole" had a distinct meaning in accountancy, that the expression 'net value' meant only 'net wealth' and that it was arrived at only after deducting the liabilities of the business disclosed in the balance-sheet from the value of the assets. Mr. A.V. Viswanatha Sastri, on the other hand, argued that section 7 (2) of the Wealth-tax Act only dealt with the ascertainment of the value of the assets of a business as a whole and that it had nothing to do with the liabilities. Learned arguments were advanced in support

1. (1963) 1 I.T.J. 684.
2. (1963) 2 I.T.J. 255 : I.L.R. (1963) Guj.
1001 : (1963) 4 Guj L.R. 741 : A.I.R. 1964 Guj

154.
3 (1964) 1 I.T.J. 423.
4. L.R. (1956) A.C. 185-203.

of the rival contentions. But, in the view we have taken on the expression 'debt owed' found in section 2 (m) of the Wealth-tax Act, it is not necessary to express our opinion on the alternative contention raised on behalf of the assessee.

In the result, we answer the first question in the affirmative; the second question, in the negative; and the third question, in the affirmative. We accordingly modify the order of the High Court. As the parties succeeded in part and failed in part, they will bear their own costs here and in the High Court.

Shah, J.—I am unable to agree with the answer propounded by Subba Rao, J., on the third question referred to the High Court.

In the balance-sheet of the company for the year of account ending on 31st March, 1957, provision was made for income-tax liability estimated at Rs. 1,03,69,009; and against this amount credit for Rs. 84,76,690 paid as advance tax was taken. The Company claimed in proceedings for assessment of wealth-tax for the assessment year 1957-58 that in the computation of net wealth the balance of Rs. 18,92,319 was liable to be deducted from the net value of the total assets as a debt owed by the Company on the valuation date. This claim was disallowed by the tax authorities, and by the High Court in a Reference under section 27 of the Wealth-tax Act, 1957.

The Wealth-tax Act, 1957, was brought into force on 1st April, 1957. Section 3 of the Act imposes a charge for every financial year commencing on and from the 1st day of April, 1957, for tax in respect of the net wealth on the corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in the Schedule. The expression 'valuation date' by section 2 (q) means in relation to any year for which an assessment is to be made the last day of the previous year as defined in clause (11) of section 2 of the Income-tax Act if an assessment were to be made under that Act for that year. 'Net wealth' as defined in section 2 (m) at the relevant time meant the amount by which the aggregate value computed in accordance with the provisions of the Act of all the assets, wherever located, belonging to the assessee on the valuation date, including assets required to be included in the net wealth as on that date under the Act, is in excess of the aggregate value of all the debts owed by the assessee on the valuation date other than * * *. Charge of the wealth-tax under the Act is, it is plain, on the terms of section 3 imposed on the net wealth of the assessee computed on the valuation date after adjusting the debts owed by the assessee on that date and permitted to be taken into account. Unlike the Income-tax Act the Wealth-tax Act prescribes the rate of tax, and *prima facie* by section 3 of the Act liability to pay wealth-tax gets crystallized on the valuation date, and not on the first day of the year of assessment.

Counsel for the Company claims that in determining the liability for wealth-tax, income-tax which would become payable on the income, profits or gains for the assessment year may be deemed a debt owed in the previous year, and liable to be adjusted in determining the aggregate value of debts for the purpose of section 2 (m). The expression "debt" is a sum of money due from one person to another; it involves an obligation to satisfy liability to pay a sum of money. The liability must be an existing liability but not necessarily enforceable *in praesenti*: an existing liability to pay a sum of money even in future is a debt, but the expression does not include liability to pay unliquidated damages nor obligations which are inchoate or contingent. Lord Justice Lindley in *Webb v Stenton*¹, observed that:

"a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation."

That definition for the purpose of the Wealth-tax Act correctly describes the concept of debt. A debt therefore involves a present obligation incurred by the debtor and a liability to pay a sum of money in present or in future. The liability must however be to pay a sum of money *i.e.*, to pay an amount which is determined or determinable in the light of factors existing at the date when the nature of the liability has to be ascertained.

In resolving the problem whether an amount estimated by the Company in its balance-sheet on the valuation date as payable to satisfy income-tax liability in the year of assessment is a debt the nature of the charge imposed by the Indian Income-tax Act, 1922, upon income earned by an assessee in the previous year must first be considered. Section 3 of the Income-tax Act provides :

"Where any Central Act enacts that income-tax shall be charged for any year at any rate or rates tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year of every individual-Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually."

Charge imposed by the Income-tax Act is on the assessable entities enumerated in section 3 in respect of the income of the previous year and not on the income of the year of assessment. But the charge is for the tax for the year of assessment, and levied at the rate or rates fixed on the total income of the assessable entity computed in accordance with and subject to the provisions of the Income-tax Act.

The Income-tax Act is the basic and permanent statute. Tax under that Act is directed to be charged in accordance with and subject to the provisions of the Act in respect of the income of the previous year of the assessable entities, but the charge imposed by the Income-tax Act is an inchoate or incomplete charge. Until the annual Finance Act is passed, imposition of the charge of income-tax does not, on the plain words used in section 3, become complete or effective, for, income-tax is to be charged in accordance with the Income-tax Act, when the Finance Act for the year enacts that the tax shall be charged at the rate or rates prescribed thereby. Liability to be taxed is therefore declared by the Income-tax Act, but the liability does not give rise to a present obligation to pay a sum of money until the Finance Act becomes operative. It may be recalled that the liability to pay wealth-tax becomes crystalized on the valuation date though the tax is levied for the assessment year, and on the valuation date there is normally no completed or effective charge for income-tax payable for the assessment year.

Section 67-B, inserted in the Act by the Income-tax Law (Amendment) Act XII of 1940, on which reliance is placed by the Company was enacted merely to maintain continuity of the levy of tax. It operates only on the first day of the assessment year i.e., after the valuation date and not before. If on the first day of the financial year the Finance Act for charging Income-tax for that year has not been enacted, the basic provisions of section 3 of the Act read with the provisions in force in the preceding year or with the provision then introduced in the Bill before Parliament whichever is more favourable to the assessee applies. The existence on the statute book of section 67-B does not, in my judgment convert what is an inchoate liability on the valuation date i.e., on the last day of the previous year, into a completed or effective liability to pay tax.

Decisions of Courts on the nature of the charge created by section 3 of the Income-tax Act are unanimous. In *Commissioner of Income-tax v. Western India Turf Club Ltd.*¹, the Western India Turf Club which was originally an unincorporated association, was registered on 1st April, 1925, as a company limited by guarantee. The company was sought to be assessed to super-tax on the income in the assessment year commencing on 1st April, 1925, at the rate applicable to an unincorporated association. The Judicial Committee held that for the purpose of super-tax the total income not of the company but of its predecessor in title had to be taken, but the tax-payer being a company falling within Part II of the Third Schedule of the Finance Act XIII of 1925, it had to pay tax at the rate applicable to a registered company and not to an un-incorporated association. In dealing with the contention of the Commissioner of Income-tax that liability to tax attached to the income of the previous year, and therefore the rate applicable to an unincorporated association applied, the Judicial Committee observed :

"The argument which has been used in favour of the appeal seems to involve the fallacy that liability to tax attached to the income in the previous year. That is not so. No liability to tax

1. (1927) L.R. 55 I.A. 14, 17 : 54 M.L.J. 1 : A.I.R. 1928 P.C. 1.

attached to the income of this company until the passing of the Act of 1925, and it was then to be taxed at the rate appropriate to a company."

In *Western India Turf Club's case*¹, income of the previous year was earned by an unincorporated association, and if liability to tax attached to the income of the previous year it would have been taxable on that footing. But the Judicial Committee held that the income of the company which came into existence in the year of assessment had to be taxed, and liability did not attach to the income of the company till the Finance Act was enacted.

In *Maharajah of Pithapuram v. Commissioner of Income-tax, Madras*², by certain deeds of trust and settlement the Maharajah of Pithapuram had settled properties on each of his daughters with the provision reserving to himself power to revoke the settlements or to make fresh dispositions as he deemed fit. For the assessment year 1939-40, the Income-tax Authorities held that the income of the previous year derived from the assets comprised in the deeds would be deemed to be the income of the assessee under section 16 (1) (c) of the Income-tax Act. The Judicial Committee held that the assessee was rightly assessed to income-tax under section 16 (1) (c) in respect of the income of the previous year and observed :

".....it should be remembered that the Indian Income-tax Act, 1922, as amended from time to time, forms a code, which has no operative effect except so far as it is rendered applicable for the recovery of tax imposed for a particular fiscal year by a Finance Act. This may be illustrated by pointing out that there was no charge on the 1938-39 income either of the appellant or his daughters, nor assessment of such income, until the passing of the Indian Finance Act of 1939, which imposed the tax for 1939-40 on the 1938-39 income and authorised the present assessment"

It has also been observed by this Court in *Chhaturam Horliram Ltd. v. Commissioner of Income-tax, Bihar and Orissa*³ :

"It is by virtue of this (section 3 of the Income-tax Act) that the actual levy of the tax and the rates at which the tax has to be computed is determined each year by the annual Finance Acts. Thus, under the scheme of the Income-tax Act, the income of an assessee attracts the quality of taxability with reference to the standing provisions of the Act but the payability and the quantification of the tax depend on the passing and the application of the annual Finance Act. Thus, income is chargeable to tax independent of the passing of the Finance Act but until the Finance Act is passed no tax can be actually levied."

In that case, the assessee company was assessed to tax for the assessment year 1939-40, but the assessment was discharged because the Finance Act of 1939 had not been extended to the Chhota Nagpur Area in the year of assessment. Bihar Regulation IV of 1942 was thereafter promulgated, by which the Finance Act was brought into force as from 30th March, 1939. The Income-tax Officer then issued a notice under section 34 of the Income-tax Act, 1922, for bringing to tax escaped income, and the assessee company challenged the validity of the notice. This Court held that the income of the company was chargeable to tax by the Income-tax Act, but unless the Finance Act was extended to the area in the assessment year 1939-40, legal authority for quantification of the tax, and for imposition of liability therefor was lacking.

Counsel for the company however sought to contend, notwithstanding the view expressed in the cases cited, that under the Income-tax Act, 1922 liability to pay income-tax arises at the latest on the last day of the previous year, and that being the valuation date under the Wealth-tax Act, in computing wealth-tax, income-tax payable for the year ending 31st March, 1957, could be regarded as a debt owed by the company on the valuation date. Counsel relied upon the following observations made by the Judicial Committee in *Wallace Brothers & Co., Ltd. v. Commissioner of Income-tax, Bombay City*⁴ :

"The general nature of the charging section is clear. First, the charge for tax at the rate fixed for the year of assessment is a charge in respect of the income of the 'previous year', not a charge

1. (1927) L.R. 55 I.A. 14, 17 : 54 M.L.J. 1 : A.I.R. 1928 P.C. 1

2. L.R. 72 I.A. 141 : (1945) 2 M.L.J. 11 : I.L.R. (1946) Mad. 1 : A.I.R. 1945 P.C. 89.

3. (1955) S.C.J. 571 : I.L.R. (1955) Pat. 553.

(1955) 2 S.C.R. 290.

4. (1948) 2 M.L.J. 62 : (1948) F.C.R. 1 : (1948) F.L.J. 32 : L.R. 75 I.A. 86 : 16 I.T.R. 240, 244

in respect of the income of the year of assessment as measured by the income of the previous year. That has been decided and the decision was not questioned in this appeal.

Second, the rate of tax for the year of assessment may be fixed after the close of the previous year and the assessment will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section alone, and it arises not later than the close of the previous year, though quantification of the amount payable is postponed."

Reliance was also placed upon the judgment of this Court in *Kalwa Devadattam and others v. Union of India and others*¹, in which the observations made by the Judicial Committee were repeated.

But the observations in both the cases were *dicta*, and have no bearing on the question falling to be determined in those cases. In *Wallace Brothers & Co.'s case*¹, the principal question which was referred for determination by the High Court was about the validity of section 4-A (c) and section 4 (1) (b) (ii) of the Indian Income-tax Act, 1922, by virtue of which the appellant company was assessed to income-tax on income which arose without British India. The Judicial Committee held that the Indian Parliament had power to tax foreign income under the legislative head "taxes on income", if there was between the person sought to be charged and the country seeking to tax him a sufficient territorial connection. In considering the question whether the Parliament had power to enact the impugned sections, the Judicial Committee explained the scheme of the Income-tax Act as stated earlier.

In *Kalwa Devadattam's case*¹, this Court was dealing with a case in which properties of a joint Hindu family consisting of a father and his three minor sons were sold by public auction to satisfy liability to pay income-tax which was assessed by appropriate proceedings under the Act. The sons thereafter sued the Union of India and others for a declaration that the orders of assessment were unenforceable, and that the sale was without jurisdiction and illegal in that the properties sold at the auction in pursuance of the assessments did not belong to the joint family, and that in any event because there has been before the assessments were completed intimation to the Income-tax Officer that there had been severance of the undivided family. This Court rejected the claim to set aside the sale. It is clear that in *Kalwa Devadattam's case*¹, assessment proceedings were held by the Income-tax Officer to assess income of the Hindu undivided family in the relevant years of assessment and the sale was challenged on the ground that the property sold did not belong to the family, and that assessments were procedurally irregular. The Court was not concerned to express any opinion on the question whether liability of the undivided family to pay tax arose before the years of assessment commenced.

In my judgment on the terms used in section 3 of the Income-tax Act, *liability to be taxed* becomes effective not later than the last day of the year of account. But the liability to *pay* tax arises only when the Finance Act becomes operative on the first day of April of the assessment year either by enactment of an Act or by virtue of section 67-B of the Income-tax Act.

The Company sought to deduct in its balance-sheet an estimated amount as the probable amount of tax which it would have to pay in the year of assessment. Out of this amount advance tax was deducted. We have held in *Commissioner of Wealth-tax, Central, Calcutta v. M/s. Standard Vacuum Oil Co. Ltd.*², that liability to pay advance tax arises when a demand notice is issued under section 18-A of the Act. For the balance taken into account in the balance-sheet there was no liability arising in the previous year which could be regarded as a debt owed by the company. Liability to be assessed to tax may and does arise under section 3 on the last day of the year of account. But that liability to tax did not give rise to any obligation to pay a sum of money either determined or determinable in the light of factors existing on that date. The liability at the earliest arises on the first day of April, 1957, but that under the Wealth-tax Act is not the valuation date.

It is not, in my judgment, open to the Court to put a strained construction upon the Act merely because a businessman may regard a liability to be taxed on the

1. (1963) 2 I.T.J. 123; (1963) 2 S.C.J. 256 : 2. (1966) 1 I.T.J. 274 : (1966) 1 S.C.J. 329.
(1964) 3 S.C.R. 191.

income of the previous year, as liability to pay tax on that income. To a commercial man the distinction between liability which arises immediately and a liability to arise in future may be blurred; but that in law is a real distinction, and a liability which arises in the year of assessment may not be projected into the account of the previous year. The provisions of the statute cannot be ignored on what are called "business considerations" and existence of a liability to pay a debt which has not in law arisen cannot be assumed. It is true that the Company did earn profits in the previous year, and for the purpose of its balance-sheet it could make an estimate but that estimate had no relevance in ascertaining whether tax payable in the assessment year would be regarded as a debt owed on the valuation date. Liability to pay tax arose not from the estimate, but from the Finance Act; it arose when the Finance Act became operative and not earlier than that.

The alternative argument raised by Counsel for the company from section 7 (2) has, in my judgment, no force. Section 7 of the Act provides :

"(1) The value of any asset, other than cash, for the purposes of this Act, shall be estimated to be the price which in the opinion of the Wealth-tax Officer it would fetch if sold in the open market on the valuation date.

(2) Notwithstanding anything contained in sub-section (1)—

(a) where the assessee is carrying on a business for which accounts are maintained by him regularly, the Wealth-tax Officer may, instead of determining separately the value of each asset held by the assessee in such business, determine the net value of the assets of the business as a whole having regard to the balance-sheet of such business as on the valuation date and making such adjustments therein as the circumstances of the case may require ;

(b) where the assessee carrying on the business, is a company not resident in India and a computation in accordance with clause (a) cannot be made by reason of the absence of any separate balance-sheet drawn up for the affairs of such business in India, the Wealth-tax Officer may take the net value of the assets of the business in India to be that proportion of the net value of the assets of the business as a whole wherever carried on determined as aforesaid as the income arising from the business in India during the year ending with the valuation date bears to the aggregate income from the business wherever arising during that year."

By the first sub-section the Wealth-tax Officer is authorised to estimate for the purpose of determining the value of any asset the price which it would fetch, if sold in the open market on the valuation date. But this rule in the case of a running business may often be inconvenient and may not yield a true estimate of the net value of the total assets of the business. The Legislature has therefore provided in sub-section (2) (a) that where the assessee is carrying on a business for which accounts are maintained by him regularly, the Wealth-tax Officer may determine the net value of the assets of the business as a whole, having regard to the balance-sheet of such business as on the valuation date and make such adjustments therein as the circumstances of the case may require. But the power conferred upon the Tax Officer by section 7 (2) is to arrive at a valuation of the assets, and not to arrive at the net wealth of the assessee. Section 7 (2) merely provides machinery in certain special cases for valuation of assets, and it is from the aggregate valuation of assets that the net wealth chargeable to tax may be ascertained. Power conferred upon the Wealth-tax Officer to make adjustments as the circumstances of the case may require is also for the purpose of arriving at the true value of the assets of the business. Sub-section (2) (a) of section 7 contemplates the determination of the net value of the assets having regard to the balance-sheet and after making such adjustments as the circumstances of the case may require. It does not contemplate the determination of the net wealth, because the net wealth can only be determined from the net value of the assets by making appropriate reductions for debts owed by the assessee. Clause (b) of sub-section (2) of section 7 also does not support the contention of the assessee that for the purposes of the Act net value of the assets of an assessee carrying on business is the same as his net wealth. Clause (b) of sub-section (2) contemplates cases where a company not resident in India is carrying on business and it is not possible to make computation in accordance with clause (a) because of the absence of a separate balance-sheet of the company. The Wealth-tax Officer is then entitled to take the net value of the assets of the business as a whole and to find the net value of the assets in India by multiplying the total value of the business with that fraction

which the income arising from the business in India during the year ending on the valuation date bears to the aggregate income from the business wherever arising during the year. This is an artificial rule adopted with a view to avoid investigation of a mass of evidence which it would be difficult to secure or, if secured, may require prolonged investigation. The adoption of an artificial rule in clause (b) of section 7 (2) is also for determination of the net value of assets and not for determination of net wealth of the foreign company. It is true that clause (a) expressly confers power upon the Tax Officer to make adjustments in the valuation of assets in the balance-sheet and in clause (b) no such power is conferred. But it must be remembered that under clause (b) the Tax Officer's powers in determining the income of a foreign company arising from the business in India and the aggregate income from the business wherever arising are not subject to any artificial rule.

The argument raised by Counsel for the assessee is that substantially section 7 (2) is a definition section, which extends for the purposes of the Act the definition of the 'net wealth' of assessee carrying on business. There is no warrant for this argument in the language used in section 7 (2). Counsel was unable to suggest any rational explanation why, if what he contends was the intention, Parliament should have adopted this somewhat roundabout way of incorporating a definition of net wealth in a section dealing with valuation of assets.

In my judgment, neither clause (a) nor clause (b) of section 7 (2) is directed towards the determination of the net wealth, and it would be impossible to hold that the Legislature intended that the net wealth for the purpose of the charge to tax under section 3 should be the net value of the assets as determined under subsection (2) of section 7.

The appeal must therefore stand dismissed with costs.

ORDER OF THE COURT—In accordance with the opinion of the majority, Civil Appeal No. 539 of 1964 is partly allowed and parties will bear their own cost here and in the High Court. Civil Appeal No. 66 of 1965 is allowed with costs.

Civil Appeal No. 67 of 1965 is unanimously dismissed with costs.

V.S.

Ordered accordingly.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Commissioner of Wealth-tax (Central), Calcutta

... *Appellant**

v.

Standard Vacuum Oil Company, Ltd.

... *Respondent.*

Wealth-tax Act (XXVII of 1957), sections 2 (m), 2 (q), 3—Computation of net wealth—Instalment of advance tax outstanding on valuation date—Whether debt owed—Income-tax Act (XI of 1922), section 18-A (1), (2), (10), (11)—Advance tax—Nature of.

Demands in respect of the payment of tax under section 18-A of the Indian Income-tax Act, 1922, were made against the assessee for the two years ending 31st December, 1956 and 31st December, 1957, by notices of demand, dated 28th May, 1956 and 31st May, 1957, respectively. The final instalment of the amount of Rs. 47,69,633 for each of the two years was outstanding on the respective valuation dates. The assessee claimed that the demand for such tax should be allowed as deduction in determining the net wealth under the Wealth-tax Act, 1957. The Appellate Tribunal held that this sum should be deducted from the total computation of wealth if the said amount was outstanding for less than a year and that the demand created under section 18-A of the Income-tax Act was a debt owed by the assessee. The High Court answered the question in favour of the assessee. On appeal to the Supreme Court.

Held, that a debt is owed when an order under section 18-A (1) of the Income-tax Act is passed and a notice of demand sent. The amount mentioned in the notice begins to be owed till a new figure is

*C.As. Nos. 627 and 628 of 1964.

substituted by the action of the assessee. On the valuation dates, the assessee had not taken any action under section 18-A (2) and consequently the amounts mentioned in the notices of demand were debts owed within section 2 (m) of the Wealth-tax Act on the valuation dates

There is no substantial difference between advance tax paid under the provisions of section 18-A and tax due and paid under a demand notice passed after an assessment. The only difference is that if the facts so warrant, the assessee is enabled to pay less than the amount demanded by the Income-tax Officer. But till a new estimate is made by the assessee, the amount is ascertained and there is a statutory liability on the assessee to pay the amount mentioned in the order under section 18-A.

Appeals from the Judgment and Order dated 14th May, 1962, of the Calcutta High Court in Wealth-tax Matter No. 154 of 1960.

A. V. Viswanatha Sastri, Senior Advocate (*N. D. Karkhanis*, *R. H. Dhebar* and *R. N. Sachthey*, Advocates, with him), for Appellant.

T. A. Ramachandran, Advocate, and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—Two questions were referred to the High Court by the Appellate Tribunal under section 27 of the Wealth-tax Act (XXVII of 1957). We are only concerned with the second question which reads as follows :—

“Whether on the facts and in the circumstances of the case, in computing the net wealth of the assessee, the arrears of tax as determined as per notice under section 18-A of the Indian Income-tax Act for the two assessment years under consideration constitute a debt owed by the assessee within the meaning of section 2 (m) of the Wealth-tax Act as on the valuation date?”

The facts and circumstances of the case are as follows: Demands in respect of the payment of tax under section 18-A of the Indian Income-tax Act, were made against the respondent-company, *M/s. Standard Vacuum Oil Co., Ltd.*, for the two years ending 31st December, 1956 and 31st December, 1957, by notices of demand dated 28th May, 1956 and 31st May, 1957, respectively. The final instalment of the amount of Rs. 47,69,653 for each of the two years was outstanding on the respective valuation dates. The assessee claimed that the demand for such tax should be allowed as deduction in determining the net wealth of the assessee under the Wealth-tax Act. The Appellate Tribunal held that this sum should be deducted from the total computation of wealth if the said amount was outstanding for less than a year. It further held that the demand created under section 18-A of the Income-tax Act was a debt owed by the assessee, and it directed the Wealth-tax Officer to ascertain “whether the demand referred to in this case was outstanding for less than one year on the valuation date and if so, he will allow the same as a deduction”. The High Court, following its decision in *Assam Oil Co., Ltd. v. Commissioner of Wealth-tax (Central), Calcutta*¹, answered the question in favour of the assessee. The Revenue having obtained certificates of fitness from the High Court filed these appeals in this Court.

Mr. Viswanatha Sastri, learned Counsel for the Revenue, contends that on a true interpretation of section 18-A the amount which is payable under it is not an ascertained amount as the assessee can estimate the amount which he should pay as advance tax. He says that the section contemplates more or less the opening of a running account between the State and the assessee and the exact amount is not finalised till the 15th of March, each year, which is the last date by which the assessee has to exercise his option to pay the amount demanded or a lesser sum. He says that the debt really becomes a debt on the 15th of March, when no option is exercised to pay a lesser sum. In order to appreciate the contention of the learned Counsel it is necessary to consider the relevant statutory provisions first of the Wealth-tax Act and then of the Income-tax Act. Section 2 (m) of the Wealth-tax Act defines “net wealth” as follows :—

“‘net wealth’ means the amount by which the aggregate value computed in accordance with the provisions of this Act of all the assets, wherever located, belonging to the assessee on the valuation date, including assets required to be included in his net wealth as on that date under this Act, is in excess of the aggregate value of all the debts owed by the assessee on the valuation date other than,—

(i) debts which under section 6 are not to be taken into account; and

(ii) debts which are secured on, or which have been incurred in relation to, any asset in respect of which wealth-tax is not payable under this Act."

Section 2 (g) defines 'valuation date' as:—

"in relation to any year for which an assessment is to be made under this Act, means the last day of the previous year as defined in clause (11) of section 2 of the Income-tax Act if an assessment were to be made under that Act for that year."

It is not necessary to set out the proviso to this definition. Section 3 is the charging section which reads as follows:—

"Subject to the other provisions contained in this Act, there shall be charged for every financial year commencing on and from the first day of April, 1957, a tax (hereinafter referred to as wealth-tax) in respect of the net wealth on the corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in the Schedule."

The question with which we are concerned is whether the amounts directed to be paid by notices of demand dated 28th May, 1956 and 31st May, 1957, are "debts owed" by the assessee within section 2 (m) on the respective valuation dates. Now the notices of demand were issued under section 18-A (1) of the Income-tax Act. The exact notices of demand which were issued are not on record, but the learned Counsel drew our attention to the form of notice prescribed under the Act. Section 18-A (1), *inter alia*, provides that the Income-tax Officer may

"by order in writing, require an assessee to pay quarterly to the credit of the Central Government on the 15th day of June, 15th day of September, 15th day of December, and 15th day of March, in that year, respectively, an amount equal to one-quarter of the income-tax and super-tax payable on so much of such income as is included in his total income of the latest previous year in respect of which he has been assessed".

It is not necessary to refer to the rate at which he has to calculate the tax. Sub-section (2) of section 18-A enables an assessee to formulate his own estimate of the tax payable by him if he considers that the income is less than the income on which he has been required to pay tax, but he has to send this revised estimate of the tax payable by him before any one of the dates specified in sub-section (1) (a) and adjust excess or deficiency in respect of any instalment already paid in a subsequent instalment or in subsequent instalments. It is this provision which Mr. Sasri relies on strongly to show that the demand under section 18-A (1) is not a debt owed, within section 2 (m) of the Wealth-tax Act. He further refers to sub-section (5) which provides for payment of simple interest by the Central Government for any amount paid by the assessee in accordance with the provisions of section 18-A. He says that this shows that it is really the Government which ultimately becomes the debtor and there is no question of any debt being owed by the assessee. He further urges that the word "debt" connotes a definite fixed amount and does not include merely a liability to pay a sum which is not ascertained.

In our opinion, the High Court was right in answering the question in favour of the assessee. Section 18-A (10) provides that if the assessee does not submit a revised estimate under sub-section (2) of section 18-A, and he does not pay on the specified date any instalment of tax that he is required to pay under sub-section (1), he shall be deemed to be an assessee in default in respect of such instalment or instalments, and if he does submit a revised estimate but does not pay an instalment in accordance therewith on the date or dates specified in sub-section (1), he shall be deemed to be an assessee in default in respect of such instalment or instalments. Under sub-section (11) any sum paid or recovered from the assessee in pursuance of the provisions of section 18-A is given credit towards the tax due in respect of the appropriate year. We cannot find any substantial difference between advance tax paid under the provisions of section 18-A and tax due and paid under a demand notice passed after an assessment. The only difference is that if the facts so warrant, the assessee is enabled to pay less than the amount demanded by the Income-tax Officer. But till a new estimate is made by the assessee, the amount is ascertained and there is a statutory liability on the assessee to pay the amount mentioned in the

order under section 18-A. We agree with the observations of the Gujarat High Court in *Commissioner of Wealth-tax v. Raipur Manufacturing Company*¹, that

“a condition subsequent, the fulfilment of which may result in the reduction or even extinction of liability, would not have the effect of converting the liability which attaches under such notice under section 18-A into a contingent liability”.

In our opinion, a debt is owed when an order under section 18-A (1) is passed and a notice of demand sent. The amount mentioned in the notice begins to be owed till a new figure is substituted by the action of the assessee. On the valuation dates in these appeals, the assessee had not taken any action under section 18-A (2) and consequently the amounts mentioned in the notices of demand were debts owed within section 2 (m) of the Wealth-tax Act on the valuation dates.

In the result we agree with the Calcutta High Court that the answer to the question referred to it should be in favour of the assessee. The appeals, therefore, fail and are dismissed with costs, one set of hearing fee.

V. S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO AND V. RAMASWAMI, JJ.

Calcutta Dock Labour Board and others

.. *Appellants**

v.

Jaffar Imam and others

.. *Respondents.*

Calcutta Dock Workers (Regulation of Employment) Scheme (1951), Clause 36—Termination of services of registered dock workers by the Calcutta Dock Labour Board for misconduct—Not permissible without proper enquiry and without due regard to principles of natural justice—Order of termination based solely on the detention order under the Preventive Detention Act (IV of 1950)—Legality of.

The respondents were dock workers attached to the Port of Calcutta and were registered in the Reserve Pool. They were detained under the Preventive Detention Act (IV of 1950) on the ground that they were guilty of violent and riotous behaviour and their detention was confirmed by the State Government after consultation with the Advisory Board constituted under section 8 of the Preventive Detention Act. After they were released from detention the Calcutta Dock Labour Board, their employer, commenced disciplinary proceedings against the respondents and served notices on them to show cause why their services should not be terminated in terms of clause 36 (2) (d) of the Calcutta Dock Workers (Regulation of Employment) Scheme (1951). The principal ground in those notices was that the respondents had been detained for acts prejudicial to the maintenance of public order and as such their services were liable to be terminated. Accordingly the respondents showed cause against the proposed order, but the Calcutta Dock Labour Board not being satisfied with their representations, terminated their services. In the enquiry thus held the respondents were not given notice of any specific allegations made against them and no evidence was led. Only the detention order was apparently produced and the order of termination was solely founded on it. On the question of the validity of the order :

Held, the order of the Calcutta Dock Labour Board terminating the services of the respondent was illegal and inoperative.

There can be no doubt that when the Calcutta Dock Labour Board purports to exercise its authority to terminate the employment of its employees, it is exercising authority and power of a quasi-judicial nature. In cases where a statutory body or authority is empowered to terminate the employment of its employees, the said authority or body cannot be heard to say that it will exercise its powers without due regard to the principles of natural justice.

1. (1963) 2 I.T.J. 255 : 52 I.T.R. 482 at p. 522.

* C.As. Nos. 569 to 571 of 1964.

22nd March, 1965

One of the basic postulates of the rule of law as administered in a democratic country governed by a written Constitution is that no citizen shall lose his liberty without a fair and proper trial according to law which inevitably means *inter alia*, a trial held in accordance with the relevant statutory provisions or in their absence, consistently with the principles of natural justice. The Preventive Detention Act (IV of 1950) is an exception to this rule but the said Act has been held to be Constitutionally valid and the validity of a detention under that Act can be challenged only on grounds permissible in the light of the relevant provisions of that Act or on the ground of *mala fides*. But it cannot be argued that after a citizen is released from such detention an employer like the Calcutta Dock Labour Board can immediately start disciplinary proceedings against him and tell him in substance that he was detained for prejudicial activities which amount to misconduct and that the detention order was confirmed by the State Government after consultation with the Advisory Board and so he is liable to be dismissed from his employment. It is obvious that the Advisory Board does not try the question about the propriety or validity of a citizen's detention as a Court of law would. In some cases the detenué may be given a hearing; but such a hearing is often, if not always, likely to be ineffective, because the detenué is deprived of an opportunity to cross-examine the evidence on which the detaining authorities rely and may not be able to adduce evidence before the Advisory Board to rebut the allegations made against him. Having regard to the nature of the enquiry which the Advisory Board is authorised or permitted to hold before expressing its approval to the detention of a detenué, it would be entirely erroneous and wholly unsafe to treat the opinion expressed by the Advisory Board as amounting to a judgment of a criminal Court.

Even in regard to its employees who may have been detained under the Preventive Detention Act, if after their release the Calcutta Dock Labour Board wanted to take disciplinary action against them on the ground that they were guilty of misconduct, it was absolutely essential that there should have been a proper enquiry. At this enquiry, reasonable opportunity should have been given to the respondents to show cause and before reaching its conclusion the Calcutta Dock Labour Board was bound to lead evidence against the respondents, give them a reasonable chance to test the said evidence, allow them liberty to lead evidence in defence and then come to a decision of its own. Such an enquiry is prescribed by the requirements of natural justice and an obligation to hold such an enquiry is also imposed by clause 36 (3) of the Calcutta Dock Workers (Regulation of Employment) Scheme (1951).

In the departmental enquiry held against the respondents it was not open to the Calcutta Dock Labour Board to act on mere suspicion and inasmuch as the order of termination in the instant case was clearly based upon the detention order and nothing else, there can be little doubt that, in substance the said conclusion was based on suspicion and nothing more.

Appeals from the Judgments and Orders dated 4th August, 1961, of the Calcutta High Court in Appeals from Original Orders Nos. 22, 29, and 30 of 1959.

B. Sen, Senior Advocate, (*S. N. Mukherjee*, Advocate, with him), for Appellant, (In all the Appeals).

K. R. Chaudhuri, Advocate, for Respondents (In all the Appeals).

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—These three appeals arise out of three writ petitions filed by the three respondents, Jaffar Imam, Brindaban Nayak and Jambu Patra, respectively on the Original Side of the Calcutta High Court against the appellant, the Calcutta Dock Labour Board. Each one of the respondents challenged the validity of the order passed by the appellant, terminating his employment as a registered dock worker with the appellant, on the ground that the said order was illegal and inoperative. The basis on which the impugned orders were challenged was that the enquiry which had been held before passing the said orders had not afforded to the respondents a reasonable opportunity to defend themselves and as such, the principles of natural justice had not been followed and even the relevant statutory provisions had been contravened. The writ petitions filed by Jaffar Imam and Jambu Patra were heard by *Sinha, J.*, whereas the writ petition filed by Brindaban Nayak was heard by *P. B. Mukharji, J.* The learned single Judges who heard these respective writ petitions substantially took the same view and rejected the contentions raised by the respondents. In the result, the writ petitions were dismissed.

Against these decisions, the respondents preferred appeals before a Division Bench of the Calcutta High Court. The Division Bench has allowed the appeals and has issued an appropriate writ directing that the impugned orders by which the employment of the respondents was terminated by the appellant should be quashed. The appellant then applied for and obtained a certificate from the said High Court and it is with the certificate thus granted to it that it has come to this Court in appeal.

It appears that the three respondents were dock workers attached to the Port of Calcutta and were registered in the Reserve Pool. On 12th August, 1955, the Commissioner of Police, Calcutta, passed an order under section 3 (1) (a) (ii) of the Preventive Detention Act, 1950 (IV of 1950) (hereinafter called 'the Act') directing that the respondents should be detained, as he was satisfied that they were guilty of violent and riotous behaviour and had committed assault and as such, it was necessary to detain them with a view to preventing them from acting in any manner prejudicial to the maintenance of public order. The respondents then made representations to the State Government under section 7 of the Act alleging that the grounds set out in the detention orders passed against them were untrue and that their detention was in fact *mala fide*.

On receipt of these representations, they were forwarded by the State Government to the Advisory Board under section 9. It is well-known that the Act had made a provision for referring orders of detention to the Advisory Boards constituted under section 8. When the Advisory Board received the representations made by the respondents, it took into account the material placed before it, considered the said representations, and submitted its report within the time specified by section 10 (1). Since the report was against the respondents, their detention was confirmed by the State Government under section 11 of the Act and in consequence, their detention was continued for about 11 months.

After they were released from detention, they applied for allocation to registered dock employment, but instead of passing orders in favour of such allocation, the appellant commenced disciplinary proceedings against them and notices were served on them to show cause why their services should not be terminated on 14 days' notice in terms of clause 36 (2) (d) of the Calcutta Dock Workers (Regulation of Employment) Scheme, 1951 (hereinafter called "the Scheme"). The principal ground in these notices was that the respondents had been detained for acts prejudicial to the maintenance of public order and as such, their services were liable to be terminated. Accordingly, the respondents showed cause against the proposed order, but the Deputy Chairman of the appellant was not satisfied with their representations, and so, he terminated their services on 17th December, 1956. While doing so, each one of them was given 14 days' wages in lieu of notice for the equivalent period. The respondents challenged this decision by preferring appeals to the Chairman of the appellant, but their appeals did not succeed and the orders passed by the Deputy Chairman were confirmed on 4th April, 1957. It is against these appellate orders that the respondents filed the three writ petitions which have given rise to the present appeals.

It is plain that both the Deputy Chairman who passed the impugned orders against the respondents, and the Chairman of the appellant who heard the respondents' appeals, have taken the view that the orders of detention passed against the respondents, in substance, amounted to orders of conviction and as such, the appellant was justified in terminating the respondents' employment. Both the original as well as the appellate orders unequivocally state that having regard to the fact that the respondents had been detained, and that their detention was confirmed and continued after consultation with the Advisory Board, it is clear that they were guilty of the conduct alleged against them in the orders of detention. In that connection, it was pointed out that the Advisory Board consisted of persons of eminent status and undoubted impartiality, and so, the fact that the representations made by the respondents were not accepted by the Advisory Board and that their detention was confirmed by the State Government in consultation with the Advisory Board, was enough to justify the appellant in terminating the employment of the respondents.

The two learned single Judges who heard the respective writ petitions substantially took the same view. Sinha, J., has observed that the respondents had a hearing before a very responsible body and the report that went against them showed that the detaining authority was justified in holding that the respondents were guilty of the charges and had thus committed acts of indiscipline and misconduct within the meaning of the Scheme. In fact, Sinha, J., felt no hesitation in holding that the appellant would be entitled to take disciplinary action against the respondents upon suspicion, and he held that the appellant's suspicion against the respondents was more than justified by the fact that the detention of the respondents received the approval of the Advisory Board. P. B. Mukherji, J., also approached the question on the same lines. He held that the appellant was entitled to take into consideration the fact that the respondents had been detained, that the statutory Advisory Board had considered the representations of the respondents and had not accepted them, and that the grounds of detention showed that the detaining authority was satisfied that the respondents were guilty of the conduct which was prejudicial to the maintenance of public order. "In the premises," said the learned Judge, "I am satisfied that the order terminating Brindaban Nayak's services was justified."

The Court of Appeal which heard the three appeals filed by the respondents against the respective orders passed by the two learned single Judges has disagreed with the approach adopted by them in dismissing the respondents' writ petitions. It has held that in acting merely on suspicion based on the fact that the respondents had been detained, the appellant had acted illegally and that made the impugned orders invalid and inoperative. Mr. B. Sen, for the appellant contends that the view taken by the Court of Appeal is erroneous in law.

Before dealing with this point, it would be useful to refer to the relevant provisions of the Scheme. The Scheme has been made by the Central Government in exercise of the powers conferred on it by sub-section (1) of section 4 of the Dock Workers (Regulation of Employment) Act, 1948 (IX of 1948). Clause 3 (n) defines a "reserve pool" as meaning a pool of registered dock workers who are available for work, and who are not, for the time being, in the employment of a registered employer as a monthly worker. The three respondents belong to this category of workers. Clause 23 of the Scheme guarantees the specified minimum wages to workers on the Reserve Pool Register. Clause 29 prescribes the obligations of registered dock workers, whereas clause 30 provides for the obligations of registered employers. Clause 31 prescribes restriction on employment, Clause 33 deals with wages, allowances and other conditions of service, whereas clause 34 is concerned with pay in respect of unemployment or under-employment. Clause 36 deals with disciplinary procedure and it is with this clause that we are directly concerned in these appeals. Clause 36 (2) provides that a registered dock worker in the Reserved Pool who is available for work and fails to comply with any of the provisions of the Scheme, or commits any act of indiscipline or misconduct may be reported in writing to the Special Officer, who may, after investigating the matter and without prejudice to and in addition to the powers conferred by clause 35, take any of the five steps indicated by sub-clauses (a) to (e) as regards that worker. Sub-clause (e) refers to dismissal of the guilty workman. Clause 36 (3) lays down that before any action is taken under sub-clause (1) or (2), the person concerned shall be given an opportunity to show cause why the proposed action should not be taken against him. Clause 36-A provides for the disciplinary powers of the Chairman of the Board. Clause 37 deals with termination of employment. Clauses 38 and 39 provide for appeals. That, in brief, is the nature of the Scheme. This Scheme was substituted by another Scheme in 1956. Clause 45 (6) of this new Scheme corresponds to clause 36 (3) of the earlier Scheme. In other words, the relevant clauses under both the Schemes require that before any disciplinary action is taken against a worker, an opportunity must be given to him to show cause why the proposed action should not be taken against him.

There can be no doubt that when the appellant purports to exercise its authority to terminate the employment of its employees such as the respondents

in the present case, it is exercising authority and power of a quasi-judicial character. In cases where a statutory body or authority is empowered to terminate the employment of its employees, the said authority or body cannot be heard to say that it will exercise its powers without due regard to the principles of natural justice. The nature or the character of the proceedings which such a statutory authority or body must adopt in exercising its disciplinary power for the purpose of terminating the employment of its employees, has been recently considered by this Court in several cases, *vide* the *Associated Cement Companies Ltd., Bhupendra Cement Works, Surajpur v. P. N. Sharma and another*¹ and *Lala Shri Bhagwan and another v. Shri Ram Chand and another*², and it has been held that in ascertaining the nature of such proceedings with a view to decide whether the principles of natural justice ought to be followed or not, the tests laid down by Lord Reid in *Ridge v. Baldwin and others*³ are relevant. In view of these decisions, Mr. Sen has not disputed this position and we think, rightly.

Therefore, the question which falls to be considered is whether the appellant can successfully contend that it was justified in acting upon suspicion against the respondents, the basis for the suspicion being that they were detained by orders passed by the appropriate authorities and that the said orders were confirmed by the State Government after consultation with the Advisory Board. It is hardly necessary to emphasise that one of the basic postulates of the rule of law as administered in a democratic country governed by a written Constitution, is that no citizen shall lose his liberty without a fair and proper trial according to law ; and legal and proper trial according to law inevitably means, *inter alia*, a trial held in accordance with the relevant statutory provisions or in their absence, consistently with the principles of natural justice. The Act is an exception to this rule and in that sense, it amounts to an encroachment on the liberty of the citizen. But the said Act has been held to be constitutionally valid, and so far as detention of a citizen effected by an order validly passed by the appropriate authorities in exercise of the powers conferred on them is concerned, its validity can be challenged only on grounds permissible in the light of the relevant provisions of the Act or on the ground of *mala fides*. Whenever detenus move the High Courts or the Supreme Court challenging the validity of the orders of detention passed against them the scope of the enquiry which can be legitimately held in such proceedings is thus circumscribed and limited. In such proceedings, Courts cannot entertain the plea that the loss of liberty suffered by the detenu by his detention is the result of mere suspicions entertained by the detaining authorities, provided the detaining authorities act *bona fide* ; their subjective judgment about the prejudicial character of the activities or conduct of the citizen sought to be detained, is not open to challenge or scrutiny in ordinary course, and in that sense, it may have to be conceded that the loss of liberty has to be suffered by a citizen if he is detained validly under the relevant provisions of the Act. Thus far, there is no dispute.

But the question which we have to consider in the present appeals is of a different character. A citizen may suffer loss of liberty if he is detained validly under the Act ; even so, does it follow that the detention order which deprived the citizen of his liberty should also serve indirectly but effectively the purpose of depriving the said citizen of his livelihood ? If the view taken by the appellant's officers who tried the disciplinary proceedings is accepted, it would follow that if a citizen is detained and his detention is confirmed by the State Government, his services would be terminated merely and solely by reason of such detention. In our opinion, such a position is obviously and demonstrably inconsistent with the elementary concept of the rule of law on which our Constitution is founded. When a citizen is detained, he may not succeed in challenging the order of detention passed against him, unless he is able to adduce grounds permissible under the Act. But we are unable to agree with Mr. Sen's argument that after such a citizen is released from detention, an employer, like the appellant, can immediately start disciplinary proceedings against him and tell him in substance that he was detained

1 A.I.R. 1965 S.C. 1595
2 A.I.R. 1965 S.C. 1767.

3. L.R. 1964 A.C. 40.

for prejudicial activities which amount to misconduct and that the detention order was confirmed by the State Government after consultation with the Advisory Board, and so, he is liable to be dismissed from his employment. It is obvious that the Advisory Board does not try the question about the propriety or validity of the citizen's detention as a Court of law would, indeed, its function is limited to consider the relevant material placed before it and the representation received from detenu, and then submit its report to the State Government within the time specified by section 10 (1) of the Act. It is not disputed that the Advisory Board considers evidence against the detenu which has not been tested in the normal way by cross-examination; its decision is essentially different in character from a judicial or quasi-judicial decision. In some cases, a detenu may be given a hearing; but such a hearing is often, if not always, likely to be ineffective, because the detenu is deprived of an opportunity to cross-examine the evidence on which the detaining authorities rely and may not be able to adduce evidence before the Advisory Board to rebut the allegations made against him. Having regard to the nature of the enquiry which the Advisory Board is authorised or permitted to hold before expressing its approval to the detention of a detenu, it would, we think, be entirely erroneous and wholly unsafe to treat the opinion expressed by the Advisory Board as amounting to a judgment of a criminal Court. The main infirmity which has vitiated the impugned orders arises from the fact that the said orders equate detention of a detenu with his conviction by a criminal Court. We are, therefore, satisfied that the Court of Appeal was right in taking the view that in a departmental enquiry which the appellant held against the respondents it was not open to the appellant to act on suspicion, and inasmuch as the appellant's decision is clearly based upon the detention orders and nothing else, there can be little doubt that, in substance, the said conclusion is based on suspicion and nothing more.

Even in regard to its employees who may have been detained under the Act, if after their release the appellant wanted to take disciplinary action against them on the ground that they were guilty of misconduct, it was absolutely essential that the appellant should have held a proper enquiry. At this enquiry, reasonable opportunity should have been given to the respondents to show cause and before reaching its conclusion, the appellant was bound to lead evidence against the respondents, give them a reasonable chance to test the said evidence, allow them liberty to lead evidence in defence, and then come to a decision of its own. Such an enquiry is prescribed by the requirements of natural justice and an obligation to hold such an enquiry is also imposed on the appellant by clause 36 (3) of the Scheme of 1951 and clause 45 (6) of the Scheme of 1956. It appears that in the present enquiry, the respondents were not given notice of any specific allegations made against them, and the record clearly shows that no evidence was led in the enquiry at all. It is only the detention orders that were apparently produced and it is on the detention orders alone that the whole proceedings rest and the impugned orders are founded. That being so, we feel no hesitation in holding that the Court of Appeal was perfectly right in setting aside the respective orders passed by the two learned single Judges when they dismissed the three writ petitions filed by the respondents.

Mr. Sen strenuously contended that if we were to insist upon a proper enquiry being held against the respondents before terminating their services, the appellant would find it impossible to take any disciplinary action against them. He urges that the respondents are bullies and they have terrorised their co-workers to such an extent that no one would be willing or prepared to give evidence against them in a departmental enquiry. Even assuming that Mr. Sen is right that the appellant would experience difficulty in bringing home its charges to the respondents, we do not see how such a fear could justify the approach adopted by the enquiry officer in the present case. What would happen if a desperate character who is in the employment of the appellant had not been detained under the Act? In such a case, before the appellant can validly dismiss such an employee, it will have to hold a proper enquiry. The circumstance that the respondents happened to be detained

can afford no justification for not complying with the relevant statutory provision and not following the principles of natural justice. Any attempt to short-circuit the procedure based on considerations of natural justice must, we think, be discouraged if the rule of law has to prevail, and in dealing with the question of the liberty and livelihood of a citizen, considerations of expediency which are not permitted by law can have no relevance whatever.

The result is, the appeals fail and are dismissed with costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO,
M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

The Tata Oil Mills Company, Ltd., Bombay

*Appellant**

v.

K. V. Gopalan and others

Respondents.

Kerala Industrial Establishments (National and Festival Holidays) Act (XLVII of 1958), sections 3 and 11
—Scope and effect of section 3 read with section 11.

The result of section 3 of the Kerala Industrial Establishments (National and Festival Holidays) Act (XLVII of 1958) was that every employer to whom the Act applied had to declare holidays on the 26th of January, the 15th August and the 1st of May and had to give four other holidays according to the decision of the Inspector, the requirement of the section being that the Inspector had to consult the employer and the employees before fixing such other holidays. In other words section 3 statutorily fixed the number of paid holidays at 7 seven fixed three out of them and left the decision of the remaining four to the Inspector.

Section 11 of the Act gives an option to the employees, they can choose to have the paid holidays either as prescribed by section 3 or as are available to them under any other law, contract, custom or usage. In exercising this choice it must however be borne in mind by the employees that the 26th of January, the 15th of August and the 1st of May have to be taken as three holidays. That is the direction of section 3. In regard to the remaining 4, the Inspector decides which days should be paid holidays. In other words, the statutory requirement is 7 paid holidays. If under the existing arrangement the employees are entitled to have more than 7 paid holidays, that right will not be defeated by section 3 because section 11 expressly provides that if the rights or privileges in respect of paid holidays enjoyed by the employees are more favourable than are prescribed by section 3, their existing rights and privileges as to the total number of holidays will not be prejudiced by section 3. The scheme of section 11 thus clearly shows that section 3 is not intended to prescribe a minimum number of paid holidays in addition to the existing ones. If in addition to the three holidays which are compulsory under section 3, the employees are getting, say three other paid holidays, then section 3 would step in and would require the employer to give his employees one more paid holiday so as to make the number of paid holidays seven. If sections 3 and 11 are read together there is no doubt that the contention that the seven holidays as prescribed by section 3 would be in addition to the existing ones is clearly untenable.

Appeals by Special Leave from the Award dated 20th September, 1962 of the Industrial Tribunal, Ernakulam in Industrial Dispute Nos. 10 and 11 of 1962, respectively.

G. B. Pai, Advocate, and J. B. Dadachanji, O. C. Mathur and Ravinder Naram, Advocates of M/s. J. B. Dadachanji & Co., for Appellant (In both the Appeals).

M. R. K. Pillai, Advocate, for Respondents (In both the Appeals).

The Judgment of the Court was delivered by

Gajendragadkar, C. J.—The short question of law which these two appeals by Special Leave raises for our decision involves the constitution of section 3 of the Kerala Industrial Establishments (National and Festival Holidays) Act, 1958

(XLVII of 1958) (hereinafter called the Act). That question arises in this way. Two complaints were filed against the appellant, the Tata Oil Mills Company Ltd., by the two groups of respondents, its workmen, respectively under section 33-A of the Industrial Disputes Act. These applications alleged that the management of the appellant had contravened the provisions of section 33 of the said Act inasmuch as it had denied its employees leave with wages on Founder's Day and Good Friday in 1962. According to the respondents, they were entitled to have holidays with pay on the said two days under the terms and conditions of service, and so, they claimed that the Tribunal should direct the appellant to give its employees holidays under the said existing arrangement and should pass other appropriate orders for the payment of wages for, the two holidays in question. The appellant disputed the correctness of the respondents' contention. The Tribunal has rejected the appellant's plea, and has declared that the respondents are entitled to the privilege of paid holidays on Founder's Day and Good Friday in 1962. It has also ordered that the appellant should pay the wages to the respondents for those two days and the proportionate salary of the staff members as soon as the award comes into force. It is against these orders passed by the Tribunal on the two complaints preferred before it by the respective respondents that the appellant has come to this Court by Special Leave; and on its behalf, Mr. Pai has contended that in making the award, the Tribunal has misconstrued the effect of sections 3 and 11 of the Act. Standing Order 30 of the Standing Orders of the appellant company makes provisions for leave of all categories. Standing Order 30 (vi) provides for holidays. It lays down that the factory will be closed on the following days which will be considered as Company Holidays with pay, and will not be counted against the casual or privilege leave of an employee :

1. New Year Day (1st January).
2. Founder's Day (Saturday nearest to 3rd March).
3. Good Friday.
4. Onam.
5. Christmas Day (25th December).

There is a note appended to this provision which makes it clear that in the event of the Company being compelled to observe a holiday or holidays for reasons of State, such day or days shall not be counted as against the privilege or casual leave of the employees but shall be treated as Company holiday or holidays. Thus, it is clear that under the relevant Standing Order, the respondents are entitled to 5 paid holidays every year.

After the Standing Orders were framed and certified, there was an agreement between the appellant and the respondents' Union as a result of which the appellant agreed to grant a further holiday, and this agreement raised the number of total paid holidays in a year to 6. The additional holiday which the appellant thus agreed to give to the respondents was to be given on the day when the respondents' Union would celebrate its Union Day. Apparently, this holiday was analogous to the Founder's Day, the idea underlying the agreement being that just as the appellant gave a paid holiday on the Founder's Day, the respondents should be given a paid holiday on the Union Day.

It appears that even after this agreement was reached, the respondents began to claim additional holidays; but the appellant was not prepared to make any addition to the list of holidays. It was prepared to leave the choice of the agreed holidays to the employees provided they submitted to the Company an agreed list of such holidays.

In 1958, the Act was passed and it came into force on the 29th December, 1958. Section 3 of the Act provides :

"Grant of National and Festival Holidays—Every employee shall be allowed in each calendar year a holiday of one whole day on the 26th January, the 15th August and the 1st May and four

other holidays each of one whole day for such festivals as the Inspector may, in consultation with the employer and the employees, specify in respect of any industrial establishment."

The result of this provision was that every employer to whom the Act applied had to declare holidays on the 26th January, the 15th August and the 1st May and had to give four other holidays according to the decision of the Inspector, the requirement of the section being that the Inspector had to consult the employer and the employees before fixing such other holidays. In other words, section 3 statutorily fixed the number of paid holidays at 7 ; fixed three out of them and left the decision of the remaining four to the Inspector who had to consult the employer and the employees.

In pursuance of this provision, the Inspector declared certain holidays for the year 1959. Not satisfied with the decision of the Inspector, one of the appellant's employees Mr. Baskara Menon filed a writ petition in the Kerala High Court under Article 226 of the Constitution challenging the validity of the Inspector's decision. In that writ petition, the question about the construction of section 3 of the Act was agitated. In the result, the High Court held that the complaint made by the petitioner against the validity of the decision of the Inspector was not well-founded, and so, the writ petition was dismissed.

In 1962, the appellant followed the same procedure and got a decision as to the festival holidays from the Inspector and declared that the said holidays would be observed as paid holidays in the year. At this time, certain industrial disputes were pending between the appellant and its employees belonging both to monthly and daily-rated categories before the Industrial Tribunal at Ernakulam. The respondents felt that the declaration of the holidays made by the appellant for the year 1962 amounted to a contravention of section 33 of the Industrial Disputes Act, and so, they filed the two present complaints before the Industrial Tribunal under section 33-A of the said Act. That, in brief, is the genesis of the present complaints.

We have already noticed the provisions of section 3 of the Act. The contention raised by the respondents before the Tribunal was that the statutory provision as to 7 paid holidays prescribes the minimum number of holidays which the employer has to give to his employees. This provision, according to the respondents, does not over-ride or abrogate the existing arrangement as to paid holidays. In regard to paid holidays which are common to section 3 and the present arrangement, they would, of course, have to be treated as paid holidays, but the four other festival holidays which the Inspector decides from year to year would be in addition to the holidays which the appellant is bound to give to the respondents under the existing arrangement, and since the appellant has limited the number of paid holidays to 7 for the year 1962, it has acted contrary to the terms of employment evidenced by the existing arrangement as to paid holidays and that constitutes the violation of section 33 of the Industrial Disputes Act. This contention has been upheld by the Tribunal ; and Mr. Pai argues that the view taken by the Tribunal is plainly inconsistent with the true scope and effect of section 3 read with section 11 of the Act.

That takes us to section 11 of the Act, because this section has to be read along with section 3 in determining the validity of the conclusion recorded by the Tribunal on the main point of dispute between the parties. Section 11 reads thus :—

"Rights and privileges under other laws, etc., not affected.—Nothing contained in this Act shall adversely affect any rights or privileges which any employee is entitled to with respect to national and festival holidays on the date on which this Act comes into force under any other law, contract, custom or usage, if such rights or privileges are more favourable to him than those to which he would be entitled under this Act."

This section gives an option to the employees ; they can choose to have the paid holidays either as prescribed by section 3 or as are available to them under any other law, contract, custom or usage. In exercising this choice, it must, however, be borne in mind by the employees that the 26th January, the 15th August and the 1st May have to be taken as three holidays. That is the direction of section 3.

In regard to the remaining 4, the Inspector decides which days should be paid holidays. In other words, the statutory requirement is 7 paid holidays. If under the existing arrangement the employees are entitled to have more than 7 paid holidays, that right will not be defeated by section 3 because section 11 expressly provides that if the rights or privileges in respect of paid holidays enjoyed by the employees are more favourable than are prescribed by section 3, their existing rights and privileges as to the total number of holidays will not be prejudiced by section 3. The scheme of section 11 thus clearly shows that section 3 is not intended to prescribe a minimum number of paid holidays in addition to the existing ones, so that the respondents should be entitled to claim the seven holidays prescribed by section 3 plus the six holidays to which they are entitled under the existing arrangement. If in addition to the three holidays which are compulsory under section 3 the employees are getting, say 3 other paid holidays, then section 3 would step in and would require the employer to give his employees one more paid holiday, so as to make the number of paid holidays 7. In our opinion, if sections 3 and 11 are read together, there can be no doubt that the respondents' claim that they should have 7 holidays as prescribed by section 3 plus 6 holidays as are available to them under the present arrangement is clearly untenable. In the present case, the respondents were having 6 paid holidays. The statute has fixed the minimum number at 7 paid holidays, and so, since the existing arrangement was less favourable to the employees, the statutory provision will come to their help and they will be entitled to claim 7 paid holidays in a year, and that means that section 3 will be operative. If that be so, the procedure followed by the employer in consulting the Inspector and in fixing the list of 4 paid holidays for 1962 in addition to the three holidays fixed by the statute is perfectly consistent with the provisions of section 3 of the Act. The Tribunal was, therefore, in error in holding that the appellant had contravened section 33 of the Industrial Disputes Act.

In the result, the appeals must be allowed, the orders passed by the Tribunal in the two respective complaints set aside, and the two complaints dismissed. There would be no order as to costs.

V.K.

Appeals allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Achuthan Nair

.. *Appellant**

v.

Chinnammu Amma and others

.. *Respondents.*

Malabar Law—Marumakkathayam Tarwad—Tarwad or self-acquired property—Presumption and onus of proof.

Courts have recognised the difference between a joint Hindu family under the Hindu Law and a tarwad under the Marumakkathayam law in the context of acquisition of properties and have adopted different principles for ascertaining whether a property acquired in the name of a member of the family is a joint family property or the self-acquired property of the said member. Under Hindu Law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. But the said principle has not been accepted or applied to acquisition of properties in the name of a junior member of a tarwad (anandravan). There is no presumption either way and the question has to be decided on the facts of each case. But it is settled law that if a property is acquired in the name of a tarwad there is a strong presumption that it is a tarwad property and the presumption must stand good unless and until it is rebutted by acceptable evidence.

In the instant case the 4th defendant one of the sons of the 1st defendant—*karnavati* had failed to discharge the burden which shifted on him to prove that the property acquired was not *tavazhi* property.

Appeal by Special Leave from the Judgment and Decree dated the 15th July, 1955 of Madras High Court in Appeal Suit No 142 of 1951.

N. C. Chatterjee, Senior Advocate, (*R. Thagarajan*, Advocate, with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (*V. A. Seyid Muhammad*, Advocate with him), for Respondents Nos. 1 to 24.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by certificate raises the question whether a certain property, described as Chalakkode property, is the property of the *tavazhi* of which the appellant and his mother are members or the separate property of the appellant.

Plaintiffs in O.S. No. 108 of 1948 in the Court of the Subordinate Judge, Palghat, and the defendants in the said suit are members of a Malabar *tavazhi* originally it was a branch of a *tarwad*, but separated itself from the said *tarwad* on 13th July, 1934, under a decree in a partition suit. The said *tavazhi* owns a number of properties. The plaintiffs filed the suit against the *tavazhi*, represented by its manager and others, for arrears of maintenance due to them and for other reliefs. In the plaint it was alleged that the said Chalakkode *nilam* property was the property of the *tavazhi* and, therefore, they were entitled to maintenance from the income of the said property also. The defendants in their written-statement denied that the said property was the property of the *tavazhi*, but alleged that it was purchased from and out of the private funds of defendant 1 and her son, defendant 4. One of the issues raised was whether the property referred to in paragraph 5 of the plaint was *tavazhi* property from which maintenance could be claimed. The learned Subordinate Judge held that the said property did not belong to the *tavazhi* but it was the personal property of defendants 1 and 4. In the result in giving a decree for maintenance, he did not take into consideration the income from the said property. On appeal, a Division Bench of the Madras High Court, having regard to the relevant presumptions under the Malabar law, held that the said property belonged to the *tavazhi*; in the result, it allowed the appeal and remanded the suit to the Court of the Subordinate Judge for fixing the rate of maintenance after taking into account the income from the said property also. The 4th defendant, after obtaining the certificate from the High Court, has preferred the present appeal to this Court against the judgment of the said Court. In this appeal, the plaintiffs, the first defendant and other defendants have been impleaded as respondents.

The only question in the appeal is whether the said property is the property of the *tavazhi* or is the self-acquired property of the first respondent and her son, the present appellant.

Mr. N. C. Chatterjee, learned Counsel for the appellant, contends that the first and the fourth defendants are not the managers of the *tavazhi* properties; even if they are, there is no presumption under the Malabar law that the properties acquired in their names are *tavazhi* properties; and that even if there is such a presumption, the appellant has proved by relevant evidence that the Chalakkode property is the self-acquired property of himself and the 1st defendant.

Mr. A. V. Viswanatha Sastri, learned Counsel for the respondents, argues that the 1st defendant is the *karnavati* of the *tavazhi*, that she was managing the *tavazhi* properties during the crucial period with the active help of her son, the 4th defendant-appellant, that there is presumption under the Marumakkathayam law that a property acquired in the name of a manager of *tavazhi* is the property of the *tavazhi* and that the said presumption has not been rebutted by any acceptable evidence. Further, he contends that the same presumption should be invoked in the case of the 4th defendant-appellant, who was in *de facto* management of the said property during the crucial period and that he had kept back all the relevant accounts and failed to rebut the said presumption.

To appreciate the scope of the said presumption it is necessary to notice briefly the relevant legal incidents of "*tarwad*" under the Marumakkathayam law. The said law governs a large section of people inhabiting the West Coast of South India. "Marumakkathayam" literally means descent through sisters' children. There is a fundamental difference between Hindu law and Marumakkathayam law in that, the former is founded on agnatic relationship while the latter is based on matriarchate. The relevant principles of Marumakkathayam law are well settled and, therefore, no citation is called for. A brief survey will suffice.

A family governed by Marumakkathayam law is known as a *tarwad*: it consists of a mother and her children, whether male or female, and all their descendants, whether male or female, in the female line. But the descendants, whether male or female, or her sons or the sons of the said descendants in the female line do not belong to the *tarwad*—they belong to the *tarwads* of their mothers. A *tavazhi* is a branch of a *tarwad*. It is comprised of a group of descendants in the female line of a female common ancestor who is a member of the *tarwad*. It is one of the units of the *tarwad*. It may own separate property as distinct from *tarwad* property. The management of a *tarwad* or *tavazhi* ordinarily vests in the eldest male member of the *tarwad* or *tavazhi*, as the case may be. But there are instances where the eldest female member of a *tarwad* or a *tavazhi* is the manager thereof. The male manager is called the *karnavan* and the female one, *karnavati*. A *karnavati* or *karnavan* is a representative of the *tarwad* or *tavazhi* and is the protector of the members thereof. He or she stands in a fiduciary relationship with the members thereof. In such a system of law there is an inherent conflict between law and social values, between legal incidents and natural affection, and between duty and interest. As the consort or the children of a male member, whether a *karnavan* or not, have no place in the *tarwad*, they have no right to the property of the *tarwad*. Whatever might have been the attitude of the members of a *tarwad* in the distant past, in modern times it has given rise to a feeling of unnaturalness and the consequent tendency on the part of the male members of a *tarwad* to divert the family properties by adopting devious methods to their wives and children. Courts have recognized the difference between a joint Hindu family under the Hindu law and a *tarwad* under the Marumakkathayam law in the context of acquisition of properties and have adopted different principles for ascertaining whether a property acquired in the name of a member of a family is a joint family property or the self-acquired property of the said member. Under Hindu law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This is a well-settled proposition of law. But the said principle has not been accepted or applied to acquisition of properties in the name of a junior member of a *tarwad* (*anandravan*). It was held that there was no presumption either way; and that the question had to be decided on the facts of each case: see *Govinda v. Nani*¹; *Dharmu Shetty v. Dejamma*²; *Soopiadath Ahmed v. Mammad Kunhu*³; and *Thatha Amma v. Thankappa*⁴. But it is settled law that if a property is acquired in the name of the *karnavan*, there is a strong presumption that it is a *tarwad* property and that the presumption must hold good unless and until it is rebutted by acceptable evidence: see *Chathu Nambiar v. Sekharan Nambiar*⁵; *Soopiadath Ahmad v. Mammad Kunhu*³; and *Thatha Amma v. Thankappa*⁴.

With this background let us look at the evidence in the case. The first question is, who is the manager of the *tavazhi*? Kunchu Kutty Amma, the first defendant, is the common ancestor and the oldest member of the *tavazhi*; defendants 2, 3, 4, 5 and 6 are her sons; defendant 7 and plaintiffs 1, 11 and 18 are her daughters;

1 (1913) I L R 36 Mad 304
2 A I R 1918 Mad. 1367.

3. A I R 1926 Mad. 643.

4. (1946) 2 M L J. 175: I L R. (1947) Mad.

272. A I R 1947 Mad 137.

5. (1924) 47 M L J 695 A I R 1925 Mad.

430 (2)

plaintiffs 2 to 10 are the children of plaintiff 1 ; plaintiffs 12 to 17 are the children of plaintiff 11 ; and plaintiffs 19 to 24 are the children of plaintiff 18. The plaintiffs' case is that the 1st defendant was the manager of the family and that she was managing the properties through her son, the 4th defendant, an Advocate. The defendants' version is that the 2nd defendant, the eldest male member of the *tavazhi*, was its manager till he executed a power of attorney in 1946 in favour of the 4th defendant. Though there is oral evidence in support of the respective versions, the documentary evidence clinches the matter in this regard. O.S. No. 65 of 1934 on the file of the Court of the Subordinate Judge, Palghat, was a suit filed by the members of the *tavazhi* for partition from the *tarwad*. There it was clearly stated in the plaint that the 1st plaintiff, i.e., the present first defendant, was the manager of the *tavazhi* ; and it was prayed therein that the *tavazhi* properties be delivered to her. Exhibits A-2 to A-5 are the *pattas* in respect of the properties allotted to the *tavazhi* ; and they show that the *pattas* of the *tavazhi* properties were transferred in the name of the 1st defendant herein. Exhibits A-6 to A-10 are the surrender deeds executed by the tenants of the 1st defendant to her as the manager of the *tavazhi* ; they relate to the year 1940. That apart, the 4th defendant himself made admissions in the previous proceedings, both civil and criminal, to the effect that his mother was the manager of the *tavazhi* and that he was managing the properties on her behalf. In C.C. No. 376 of 1942, in the Court of the Sub-Magistrate, Alathur, he deposed as follows :

"My mother is the manager of my *tavazhi*. I am managing the affairs of my *tavazhi* on behalf of my mother. I am paying the Government assessment in respect of the paramba on behalf of my mother." (See Exhibit A-21.)

In O.S. No. 154 of 1940 in the Court of the District Munsif, Alathur, he deposed as D.W. 1 thus :

"My mother is the manager of the *tavazhi*." (See Exhibit A-22.)

Exhibit A-17 is the deposition of the present 4th defendant's father in O.S. No. 237 of 1942, which runs thus :

"Plaintiff (present first defendant) is manager of her *tavazhi*. The properties in these two suits belong to that *tavazhi*."

In the cross-examination he further stated that he and his Advocate son managed the *tavazhi* affairs and that the manager was the plaintiff, i.e., the 1st defendant herein. For the first time, the 2nd defendant came on the picture only when he gave a power of attorney to the 4th defendant describing himself as the manager of the *tavazhi*. The power of attorney is dated 5th July, 1946. Under the said power of attorney, the 2nd defendant, describing himself as the *karnavan*, entrusted the entire management of the *tavazhi* properties and the conduct of the suits relating thereto to the 4th defendant. Learned Counsel for the respondents suggests that this power of attorney was given in connection with an earlier suit for maintenance in order to deprive the plaintiffs of their right to maintenance to some extent. The 4th defendant gave evidence in O.S. No. 51 of 1946 on the file of the Court of the Subordinate Judge, Palghat, and the deposition is marked as Exhibit B-6 ; his cross-examination therein discloses that the power of attorney was executed only in a hurry for the purpose of that suit on a stamp-paper available with a third party and that the 4th defendant did not carry out any of the directions given thereunder. Except the fact that it was filed in that suit, the said power of attorney was not used or acted upon for any other purpose. The recital in the power of attorney that the 2nd defendant was the manager is inconsistent not only with the documentary evidence we have already considered, but also with the admissions made both by the 4th defendant and his father.

The oral evidence adduced in the case does not carry the matter further. The 4th defendant's father asserts in the examination-in-chief that the 2nd defendant is the manager of the *tavazhi*, that the 1st defendant did not manage the affairs of the *tavazhi* at any time, that after partition he was collecting the rents and meeting the expenses of the *tavazhi* and that P.W. 1 (the present 1st plaintiff's husband) was also helping him. In the cross-examination he says that he maintained the accounts, but they were taken away by the 1st plaintiff. He admits that the 1st defendant

filed O. S. No. 64 of 1954 as the manager of the *tavazhi* and that she was described as the manager in the surrender deeds. He further admits that though the 2nd defendant was the oldest male member of the *tavazhi*, he did not look after its affairs. As stated earlier, this witness admitted in the earlier proceedings that the 1st defendant was the manager and the 4th defendant was conducting the affairs of the *tavazhi* on her behalf. This witness obviously is lying in the witness-box to support the case of his wife and son. In his evidence the 4th defendant also asserts that he did not manage the *tavazhi* affairs before the power-of-attorney was executed in his favour in July, 1946. Apart from the admissions made by him in the earlier proceedings, the diary kept by him and marked as Exhibit A-16 belies his present version. It covers the period from 2nd April, 1939 to 30th December, 1939. It contains some items admittedly relating to the management of the *tavazhi* property. His evidence, is inconsistent with the documentary evidence produced in the case, with the admissions made by him earlier and with the entries found in the diary maintained by him. We may at this stage mention that the fact that the learned Subordinate Judge accepted the oral evidence adduced on behalf of the defendants has no particular significance in this case, for the learned Subordinate Judge did not examine the witnesses in Court, but the oral evidence adduced in the earlier maintenance suit was marked by consent as evidence in the present case. The learned Subordinate Judge, therefore, was not in a better position than the High Court in the matter of appreciating the oral evidence as he could not have observed their demeanour. We, therefore, agree with the High Court on a consideration of the documentary and oral evidence, that the 1st defendant is the *karnavali* of the *tavazhi* and her son, the 4th defendant, who is an Advocate, has been managing the properties on her behalf.

If that be so, so far as the 1st defendant is concerned, there is a strong presumption that the said property was acquired from and out of the funds of the *tavazhi*; and, so far as the 4th defendant is concerned, in the circumstances of the present case the position is the same; though in law he was not the manager, we find he was in *de facto* management of the *tavazhi* properties, and, therefore, in possession of the *tavazhi* properties, its income and the accounts relating to those properties. Being in management of the properties, he stood in a fiduciary relationship with the other members of the *tavazhi*. Irrespective of any presumption, the said circumstances must be taken into consideration in coming to the conclusion whether the said property is *tavazhi* property or not.

Let us now trace the title of the Chalakkode property. Chalakkode property originally belonged to Cheerath *tarwad*, i.e., the *tarwad* of the 4th defendant's father and 1st defendant's husband. One Velu obtained a decree in S.C. No. 126 of 1933 on the file of the Subordinate Judge, Palghat, against the said *tarwad*. On 11th April, 1944, the said decree was assigned under Exhibit B-2 to defendants 1 and 4 for a sum of Rs. 1,500. No cash was paid towards consideration, but a promissory note was executed for the said amount. The assigned decree was put in execution and the Chalakkode property was brought to sale and was purchased in the Court-auction again in the names of defendants 1 and 4 for a sum of Rs. 1,010. Exhibit A-12 is the sale certificate. It shows that the said amount was set-off against the amount due under the decree. It also discloses that the sale was subject to two encumbrances of Rs. 10,000 and Rs. 1,500 respectively. These encumbrances were discharged by payments made on 25th March, 1946, and 11th March, 1946, respectively. It is seen from the said narration of facts that Rs. 14,010 was spent for securing the said property. Who paid the said amount? Is it the *tavazhi*, the 1st defendant or the 4th defendant alone?

It cannot be disputed that the *tavazhi* has sufficient properties and from its income the Chalakkode property could have been purchased. The 4th defendant's father in his evidence admits that the *tavazhi* got properties under the partition decree in O. S. No. 64 of 1934 on the file of the Court of the Subordinate Judge, Palghat and even before that it was in possession of Kollengode properties and that the first defendant and one Padmanaban Nair were collecting rents of the Kollengode

properties. The 4th defendant in his earlier deposition admitted that the *tavazhi* got an income of 9,000 paras of paddy. There is also evidence in this case that the 1st defendant had no personal income other than the income from the *tavazhi* and her husband did not give her any money. In Exhibit B-7 her husband says that the 1st defendant did not use any money given by him for the purchase of any property and also admits that there are no records that the 1st defendant had any funds of her own before the partition. Therefore, if the case of the 4th defendant was true, he should have found money to the extent of Rs. 14,000 from his personal income. He comes with a definite case. His case falls under two parts. The first part is that he took on lease the entire Chalakkode lands from the mortgagee and he was making a profit of 1,300 paras of paddy every year. The second part of his case is that he was paying subscription to a *kuri* (chit) started by one Ramaswamy Iyer and got Rs. 13,000 from the *kuri*. Let us now test the truth of this case. In 1937 under Exhibit B-12 the 4th defendant obtained a lease of a portion of the Chalakkode lands from his father. He says that he was getting a profit of 200 paras of paddy out of those lands. He surrendered his leasehold in favour of the mortgagee and executed a fresh lease under Exhibit B-13 in respect of the entire Chalakkode lands. He says in his evidence that he was making a profit of 1,300 paras of paddy every year out of the lease. Except his assertion in his evidence there is nothing on record to disclose the income he was getting from the said lease and whether any part of the said income was available for either discharging the promissory note or the encumbrances. Indeed, it is admitted in the cross-examination that he did not actually cultivate the lands but the 6th defendant was cultivating them. His father in his evidence deposes that the 4th defendant did not actually cultivate the lands but the 6th defendant had been cultivating the lands under the 4th defendant and paying 910 paras of paddy to the 4th defendant, who used to pay the same to him and that the 4th defendant had no profits under the said transactions. This covers the period before he surrendered the lease to his father. This evidence establishes that he had no profits till that date. As regards the income from the lands and the profits realised by him after he took a lease of the land from the mortgagee, he could have produced the accounts to substantiate his case; but, on the other hand, he says in his evidence :

"I used to keep accounts from 1944 onwards. I was in Madras in 1941-42. I had private income then. I did not keep any accounts till 1944. My account books kept after 1944 will show my private income. Those account books are not produced. My private accounts show my private income and expenses. The income from Chalakkode lands will not find a place in my private accounts which show only my profession income."

It is not possible to believe that if he was really a lessee under the mortgagee, the income from the lands would not have found a place in his accounts. There is much to be said in favour of the suggestion that the lease was only a benami for his father, that he was never in possession of the property and, therefore, his accounts would not show his income from the said property. We, therefore, hold that he was not the real lessee and that even if he was, it has not been established that he made any appreciable income from the said property to enable him to save substantial amounts therefrom. Let us now test the veracity of the second part of his version. The said property was purchased in the names of the 1st and the 4th defendants; see Exhibit A-12. On 12th January, 1944, Ramaswamy Iyer started a *kuri* consisting of 32 tickets, including the stake-holder's ticket, of Rs. 1,000 each for a total amount of Rs. 32,000. Each ticket was divided into two half-tickets of Rs. 16,000 each. The ticket for Rs. 32,000 was purchased in the name of the 1st defendant. On 8th January, 1946, in regard to the half ticket, the 1st defendant and the 4th defendant received Rs. 13,000. In regard to the future instalments to be paid by them, they executed a mortgage in favour of the stakeholder mortgaging the Chalakkode property. This document establishes that defendants 1 and 4 received Rs. 13,000 on 8th January, 1946. But that in itself does not establish that the subscriptions to the *kuri* were paid by the 4th defendant from his personal income. Indeed, the fact that the ticket was purchased in the name of the 1st defendant indicates that it was for the *tavazhi*. Being the *de facto* manager, the 4th defendant presumably joined

in the execution of the mortgage deed. The 4th defendant could have proved that the subscriptions were paid from his personal income by producing the relevant accounts. But he says in his evidence :

"My private accounts will not show the payment of *kuri* subscription in the Rs. 16,000 *kuri* of Ramaswami Iyer. The *kuri* receipt for Rs. 1,717-0-7 is in the name of my mother first defendant. There is no voucher or bank account to show that I paid Rs. 1,717-0-7 as *kuri* subscription. M.N. Ramaswami Iyer is not summoned as witness to prove that I paid the subscription "

This evidence is destructive of the 4th defendant's version. He has accounts, but those accounts do not contain any entry in regard to the payment of the subscription to the *kuri*. They would not contain such an entry for the obvious reason that the entry must have been made in the *tavazhi* accounts ; but the *tavazhi* accounts were suppressed on the specious plea that they were taken away by the 1st plaintiff, for which suggestion there is no justification. The bare assertion to that effect by the 4th defendant's father cannot be accepted.

Learned Counsel for the appellant strongly relied upon the evidence of the 1st plaintiff's husband in support of his contention that the plaintiff has failed to prove that the consideration for the purchase of the said property passed from the *tavazhi*. But a perusal of his evidence shows that he does not know anything about the *tavazhi* matters, though he married a member of the *tavazhi*. He is ignorant of the *tavazhi* affairs. Both the Courts rightly ignored his evidence.

To sum up : the *tavazhi* has properties yielding appreciable income from and out of which the Chalakkode property could have been purchased. The 1st defendant was the *karnavati* of the *tavazhi* and the 4th defendant was managing the *tavazhi* properties on behalf of his mother, the 1st defendant. The assignment of the decree in execution whereof the said property was purchased was taken in favour of both defendants 1 and 4, the *de jure* and the *de facto* managers respectively. The sale certificates for the same was issued in the names of both of them. The ticket for the *kuri* was admittedly taken in the name of the 1st defendant and it is admitted by the 4th defendant that his accounts would not disclose that he paid the subscriptions to the *kuri*. So far as the 1st defendant is concerned, the strong presumption against her exclusive title has not been rebutted by any evidence at all ; as regards the 4th defendant, the following facts establish that the said property was *tavazhi* property : (i) the *tavazhi* has properties yielding appreciable income from and out of which the said property could have been purchased ; (ii) the 4th defendant was managing the properties of the *tavazhi* on behalf of the 1st defendant ; (iii) he stood in a fiduciary relationship with the members on whose behalf he was managing the properties ; (iv) in every relevant transaction the 1st defendant, the *karnavati*, was made a party ; and (v) the 4th defendant has suppressed both the accounts of the *tavazhi* and his personal accounts and has failed to prove that he had any personal income from and out of which he could have paid Rs. 14,000 odd towards the purchase of the said property. The facts certainly shift the burden of proving title to the property to the 4th defendant and he has failed to discharge the same. From the aforesaid facts we have no hesitation in agreeing with the finding of the High Court that the said property was the property of the *tavazhi*.

In the result, the appeal fails and is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Pacific Minerals (P.), Ltd.

.. Appellant*

v.

The State of Madhya Pradesh and another

.. Respondents.

Deed—Construction—Mining lease—Provision for computation of royalty on the difference between the sale price and the cost of carriage and freight and such other charges as are usually incurred in conveying and causing the same to be delivered to the purchasers in terms of sales—Export duty and sales tax—If to be treated as “other charges”.

In a mining lease provision was made for computation of royalty on the ore on the difference between the sale price and the cost of carriage and freight and other charges as are usually incurred in conveying and causing the same to be delivered to the purchasers in terms of the sales:

Held : Export duty on the F.O.B. sales and sales tax on the F.O.R. sales are not allowable deductions as “other charges” incurred in causing the ore to be delivered to the purchasers. The “other charges” contemplated by the clause are of the same kind as cost of carriage and freight.

Appeal from the Judgment and Order dated the 11th June, 1959, of the Madhya Pradesh High Court in Misc. Petition No. 239 of 1957.

A. S. Bobde and G. L. Sanghvi, Advocates, and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., for Appellants

B. Sen, Senior Advocate, (M. B. Shroff and I. N. Shroff, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Bachawat, J.—The question in this appeal turns entirely on the meaning to be given to the words “the cost of carriage and freight and such other charges as are usually incurred in conveying and causing the same (the manganese ore) to be delivered to the purchasers in terms of the sales,” as used in two mining leases.

The appellant is the lessee of the Laughar and Netra manganese mines in Balaghat district under lease deeds dated 17th August, 1938 and 5th December, 1938, by the State Government of Central Provinces and Berar. Both the leases provided for payment of royalty at the rate of 5 per cent of the sale value at the pit's mouth of dressed ore raised from or out of and carried away or exported from the demised lands. Clause 2 of Part VI of the lease provided for the computation of royalty thus :

“2. In order to arrive at the sale value of the manganese ore at the pit's mouth for the purpose of assessing the royalty as hereinbefore provided the lessee shall at the request of the Lessor submit either yearly or half-yearly a statement showing the selling price of all or (at the option of the Lessor) a part of the ore carried away or exported from the said lands during the period asked for and giving a full and true account of the cost of carriage and freight and such other charges as are usually incurred in conveying and causing the same to be delivered to the purchasers in terms of the sales. The lessee shall at the same time submit audited books of accounts showing the percentage in units of the metal contained in every consignment of ore carried away or exported from the said lands or at the option of the Lessor signed copies of the analysis of the ore made by some firm of analytical chemists approved by the Lessor. And it is agreed that the value at the pit's mouth of all ore so carried away or exported by the lessee/lessees upon which the aforesaid royalty is to be paid shall be taken to be the difference between the said selling price of the ore and the said charges incurred by the lessee up to the date of the delivery of the same as aforesaid the calculation being made upon the basis of the statements of figures contained in the account and other document to be submitted by the lessee as above provided. The said royalty shall be calculated upon the said ore as and when the same shall be carried away or exported from the said lands or previous to its use for the extraction or preparation of manganese therefrom.”

The leases were granted under the Mining Manual of the Central Provinces and Berar then in force, and the appellant was required to submit to the Deputy Commissioner, Balaghat, half-yearly returns in Forms Nos. 7 and 7-A of Appendix B of

Part A of the Mining Manual showing separately the selling price and the expenses incurred by him. The appellant submitted half-yearly returns ending 30th June 1951 and 31st December, 1951. For the F.O.B. sales, the appellant claimed deduction of export duty levied by the Central Government under section 28 of the Sea Customs Act, 1878 read with section 2 and Second Schedule, item No. 7 of the Indian Tariff Act, 1934. For the F.O.R. sales, the appellant claimed deduction of sales tax chargeable under section 4 of the Central Provinces and Berar Sales Tax Act, 1947. The Deputy Commissioner, Balaghat assessed the royalty after disallowing the appellant's claim for deduction of the export duty and sales tax. This assessment was confirmed by the State Government. The appellant paid the royalty and thereafter, filed a writ petition in the High Court of Madhya Pradesh challenging the assessment. The High Court dismissed the petition. The appellant now appeals to this Court by Special Leave.

In computing the sale value of the manganese ore at the pit's mouth, clause 2 of the mining lease allows deductions from the selling price of "the cost of carriage and freight and such other charges as are usually incurred in conveying and causing the same to be delivered to the purchasers in terms of the sales." We think that this clause allows deduction of the charges incurred in conveying and delivering the manganese ore to the buyers in terms of the sales, such as the cost of carriage and freight and like charges. The other charges contemplated by the clause are of the same kind as cost of carriage and freight. This conclusion is reinforced if we refer to the Standard Forms Nos. 7 and 7-A of Appendix B and Rule 50 (1) of Chapter I of Part A of the Mining Manual, under which the leases were granted. Form No. 7 in respect of F.O.B. sales contemplates deduction of commission, port charges, railway freight, handling charges at rail head and in Bombay and transport to rail head. Form No. 7-A in respect of F.O.R. sales contemplates deduction of commission, handling charges at rail head and transport to rail head. The allowable deductions from the selling price less commission are thus the cost of carriage and freight and other like charges, such as handling charges and port charges. Export duty on the F.O.B. sales and sales tax on the F.O.R. sales are not allowable deductions.

In F.O.B. sales, the price is inclusive of the export duty. The appellant was required to pay the duty before shipment under section 137 of the Sea Customs Act, 1878. In terms of the sales, the appellant was required to place the goods on board the ship, and it could do this only on payment of the export duty. In other words, the delivery to the buyer in terms of the F.O.B. sale could not be made without paying the export duty. Nevertheless, the export duty is not, like transport and freight charges, an expense incurred in conveying and causing delivery of the ore to the buyer.

Under the sale contracts, the appellant was bound to pay and bear the sales tax on its own account. As a dealer, the appellant was chargeable with sales tax on its turnover. The sales tax is not an expense incidental to conveyance and delivery of the ore to the buyer, and is not an allowable deduction.

No valid ground is shown for quashing the assessment and the High Court rightly dismissed the petition. In the circumstances, it is not necessary to consider the further questions whether recourse to Article 226 of the Constitution was misconceived and the appellant's proper remedy was to sue for refund of the royalty.

The appeal fails, and is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYA-TULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

The Union of India

.. Appellant*

v.

The West Punjab Factories, Ltd.

.. Respondent etc.

Railways Act (IX of 1890), section 72—Consignment destroyed by fire—Liability of railway—Consignor of goods consigned to a consignee—When entitled to sue for damages—Endorsee of railway receipt—Right to sue—Interest before date of suit—Right to—Damages to be according to market rate at date of loss and not contract rate between parties.

In respect of goods (cotton) consigned to a consignee destroyed by fire at the destination station the consignor filed a suit for damages against the Railway. In another case the endorsee of the railway receipt filed a suit for damages. Though notice of arrival of goods had been given the endorsee sought to take delivery only after 14 days by which time the goods had been destroyed by fire. In the circumstances,

Held: (i) Ordinarily, the consignor is the person who has contracted with the railway for the carriage of goods and he can sue for damages for the loss of the goods and it is only where title to the goods has passed that the consignee may be able to sue. Whether the goods has passed from the consignor to the consignee will depend upon the facts of each case. The mere fact that the consignee is different from the consignor does not necessarily pass title to the goods from the consignor to the consignee. The question whether title to goods has passed to the consignee will have to be decided on other evidence.

[In the instant case the contract was that goods would pass only on delivery being made at the consignees godowns.]

The endorsee of a railway receipt in respect of a consignment booked to self, as owner of the goods is entitled to sue for damages for loss of the goods.

(ii) Though there was token delivery by surrendering the railway receipts and signing the delivery book, even before the wagons were unloaded, there was no real delivery to the consignee and the goods were still in the control and custody of the railway when they were destroyed by fire and the railway was liable for the damages.

(iii) It is the market price at the time the damage occurred which is the measure of damages to be awarded.

(iv) In the absence of any usage or contract express or implied it is not possible to award interest by way of damages.

(v) The responsibility of the railway under section 72 of the Railways Act continues until terminated in accordance with sections 55 and 56 of the Railways Act. Even though the responsibility of the railway as a carrier may come to an end within a reasonable time after the goods have reached the destination-station, its responsibility as a warehouseman continues and that responsibility is also the same as that of a bailee.

Under the Rules the goods had to remain at the destination-station for one month after their arrival there. Though the consignee may have to pay wharfage or demurrage after 3 days the responsibility of the railway as a warehouseman continued and the railway would be liable to make good the loss.

Appeals from the Judgment and Decree, dated the 9th December, 1958, of the Allahabad High Court in First Appeals Nos. 373 of 1945 and 92 of 1946 and Appeal by Special Leave from the judgment and decree dated the 9th December, 1958 of the Allahabad High Court in first Appeal No. 374 of 1945.

N. D. Karkhanis and R. N. Sachthey, Advocates, for Appellant (in all the three Appeals).

G. S. Pathak, Senior Advocate (Rameshwar Nath, S. N. Andley and P.L. Vohra, Advocates of M/s. Rajinder Narain & Co., with him) for Respondent (in all the three Appeals).

The Judgment of the Court was delivered by

Wanchoo, J.—These three appeals raise common questions and will be dealt with together. They arise out of two suits filed against the Government of India claiming damages for loss of goods which were destroyed by fire on the railway platform at Morar Road Railway Station. One of the suits was filed by Birla Cotton Factory Limited, now represented by the West Punjab Factories Limited (hereinafter referred to as the Factory). It related to six consignments of cotton bales booked from six stations on various dates in February and March, 1943 by the Factory to Morar Road Railway Station. In five of the cases, the consignment was consigned to J. C. Mills while in one it was consigned to self. The consignments arrived at Morar Road Railway Station on various dates in March. Delivery was given of a part of one consignment on 7th March, 1943, while the remaining goods were still in the custody and possession of the railway. On 8th March, 1943, a fire broke out at the Morar Road Railway Station and these goods were involved in the fire and severe damage was caused to them. It is not necessary to refer to the details of the damage for the matter is not in dispute between the parties. The case of the Factory was that the damage and loss was caused while the goods were in the custody and control of the railway administration and it was due to misconduct, negligence and carelessness on the part of the railway administration. Consequently, the suit was filed for Rs. 77,000 and odd along with interest upto the date of the suit and interest *pendente lite* and future interest.

In the other suit there was one consignment of 45 bales of cotton yarn. This consignment was booked from Belanganj to Morar Road Railway Station on 22nd February, 1943, and the railway receipt relating to this consignment was endorsed in favour of Ishwara Nand Saraswat who filed the suit. This consignment arrived at Morar Road Railway Station on 23rd February, 1943. Ishwara Nand Saraswat went to take delivery of this consignment on 10th March, 1943, his case being that he had received the railway receipt on 9th March, 1943. He then came to know that the consignment was involved in a fire which had taken place on 8th March, 1943, and severe damage had been done to the consignment. Ishwara Nand Saraswat therefore filed the suit on the ground that damage and loss was due entirely to the gross negligence of the railway administration. He claimed Rs. 72,000 and odd as damages and also claimed interest upto the date of the suit and *pendente lite* and future interest.

The suits were resisted by the Government of India. In the first suit by the Factory, it was pleaded that the Factory could not sue as the goods in five of the receipts had been consigned to the J. C. Mills; secondly, it was pleaded that delivery had been given of at least five of the consignments to the J. C. Mills before the fire broke out and the railway administration was not therefore responsible for the damage done by the fire, for it was the fault of the J. C. Mills not to have removed the goods immediately after the delivery, thirdly, it was pleaded that damages should have been granted at the rate of Rs. 38 per bale, which was the price contracted for between the buyer and the seller and not at the market rate on the date of the damage as was done by the Courts below; fourthly, it was pleaded that no interest should have been allowed for the period before the suit; and lastly, it was pleaded that the conduct of the railway administration was not negligent and therefore the railway was not bound to make good the loss.

On these pleas, five main issues relating to each of them were framed by the trial Court. The trial Court found that the Factory could maintain the suit and decided accordingly. It also found that in the case of five consignments by the Factory, delivery had been given before the fire broke out and therefore the railway was not responsible; in the case of the sixth consignment it held that there was no proof that delivery had been given before the fire broke out and that the railway would be responsible if negligence was proved. On the quantum of damages, the trial Court held that the damages had to be calculated at the market price on the date of the fire and not at the contract price between the buyer and seller. On the question of interest, the trial Court held that interest before the date of the suit

should be allowed on equitable grounds. Finally, on the question of negligence the trial Court held that there was negligence by the railway and it was therefore liable for loss and damage caused by the fire which broke out on 8th March, 1943. As, however, the trial Court had held that delivery had been given in the case of five consignments, though the goods had not been removed, the railway was not responsible for the loss. It therefore decreed the suit in part with respect to the sixth consignment about which it had found that there had been no delivery.

The same issues were raised in the suit by Ishwaranand Saraswat. But there was one additional issue in that suit based on the contention of the Government of India that it had given notice to Ishwaranand that the consignment had arrived on 23rd February, 1943. Ishwaranand, however, did not come to remove the goods, till 8th March, 1943, when the fire broke out; therefore it was urged that the liability of the railway administration as carrier had ceased after the lapse of reasonable time after arrival of the consignment at the railway station. This reasonable time could not be beyond three days in any case and therefore the railway administration was not bound to make good the loss even if it had been occasioned on account of the negligence of the administration. As Ishwara Nand should have removed the consignment within three days of 23rd February, it was his failure to do so which resulted in the damage and loss. The issues which were common to this suit and the suit by the Factory were decided on the same lines by the trial Court as in the suit by the Factory. On the further issue which arose in this suit as to the delay in the removal of goods after notice to Ishwara Nand, the trial Court held after reference to certain rules made by the railway administration that even if the railway administration's responsibility as carrier had ceased after the lapse of reasonable time, it was still liable as a bailee either as a warehouseman or as a gratuitous bailee. It therefore gave a decree for Rs. 76,000 and odd to Ishwara Nand.

Then followed three appeals to the High Court—two in the suit by the Factory and one in the suit of Ishwaranand. The appeal in the suit by Ishwara Nand was by the Government of India; one appeal in the suit by the Factory was by the Factory with respect to that part of the claim which had been dismissed, and the case of the Factory was that in fact no delivery has been made to it and it was entitled to the entire sum claimed as damages. The other appeal was by the Government of India with respect to the amount decreed by the trial Court and it raised all the contentions which had been raised before the trial Court.

The High Court dealt with the three appeals together. In all appeals the High Court confirmed the finding of the trial Court that there had been negligence on the part of the railway which resulted in damage to the goods. On the question whether the suit could be maintained by the plaintiffs, the High Court affirmed the finding of the trial Court that both the suits were maintainable. The High Court also affirmed the finding of the trial Court with respect to the rate at which damages should be calculated and on the question of interest before the date of the suit. Further in the suit by Ishwara Nand, the High Court held that even if the railway administration ceased to be responsible as a carrier after a reasonable time had elapsed after the arrival of the goods at Morar Road Railway Station, it was still responsible as a warehouseman. The appeal therefore of the Government of India in Ishwara Nand's suit was dismissed. On the question of delivery in the Factory's suit the High Court disagreed with the finding of the trial Court that there had been delivery of five consignments. It held that there was no effective delivery even of these five consignments. In consequence, the appeal of the Factory was allowed while that of the Government of India was dismissed.

Then followed applications to the High Court for leave to appeal to this Court in the Factory's suit. The High Court granted the certificate as the judgment was one of variance and the amount involved was over rupees twenty thousand. However, in the suit of Ishwara Nand, the High Court refused to grant a certificate as the judgment was one of affirmance and no substantial question of law arose. Thereupon the Government of India applied to this Court for Special Leave in

Ishwara Nand's suit and that was granted. The three appeals have been consolidated in this Court for as will be seen from what we have said above, the principal points involved in them are common.

Learned Counsel for the appellant has not and could not challenge the concurrent finding of the trial Court and of the High Court that the fire which caused the damage was due to the negligence of the railway administration. But the learned Counsel has pressed the other four points which were raised in the Courts below. He contends—(i) that the suits as filed were not maintainable, (ii) that the High Court was in error in reversing the finding of the trial Court that the delivery had been given with respect to five of the consignments in the Factory's suit, (iii) that damages should have been awarded at Rs. 38 per bale which was the contract price between the buyer and seller and not at the market price on the date on which the damage took place, and (iv) that interest could not be awarded for the period before the suit on the amount of damages decreed.

Re. (i).

The contention of the appellant with respect to five of the consignments in the suit of the Factory was that as the consignee of the five railway receipts was the J.C. Mills, the consignor (namely, the Factory) could not bring the suit with respect thereto and only the J.C. Mills could maintain the suit. Ordinarily, it is the consignor who can sue if there is damage to the consignment, for the contract of carriage is between the consignor and the railway administration. Where the property in the goods carried has passed from the consignor to some-one-else, that other person may be able to sue. Whether in such a case the consignor can also sue does not arise on the facts in the present case and as to that we say nothing. The argument on behalf of the appellant is that the railway receipt is a document of title to goods [see section 2 (4) of the Indian Sale of Goods Act III of 1930], and as such it is the consignee who has title to the goods where the consignor and consignee are different. It is true that a railway receipt is a document of title to goods covered by it, but from that alone it does not follow, where the consignor and consignee are different, that the consignee is necessarily the owner of goods and the consignor in such circumstances can never be the owner of the goods. The mere fact that the consignee is different from the consignor does not necessarily pass title to the goods from the consignor to the consignee, and the question whether title to goods has passed to the consignee will have to be decided on other evidence. It is quite possible for the consignor to retain title in the goods himself while the consignment is booked in the name of another person. Take a simple case where a consignment is booked by the owner and the consignee is the owner's servant, the intention being that the servant will take delivery at the place of destination. In such a case the title to the goods would not pass from the owner to the consignee and would still remain with the owner, the consignee being merely a servant or agent of the owner or consignor for purposes of taking delivery at the place of destination. It cannot therefore be accepted simply because a consignee in a railway receipt is different from a consignor that the consignee must be held to be the owner of the goods and he alone can sue and not the consignor. As we have said already, ordinarily, the consignor is the person who has contracted with the railway for the carriage of goods and he can sue; and it is only where title to the goods has passed that the consignee may be able to sue. Whether title to goods has passed from the consignor to the consignee will depend upon the facts of each case and so we have to look at the evidence produced in this case to decide whether in the case of five consignments booked to the J.C. Mills, the title to the goods had passed to the Mills before the fire broke out on 8th March, 1943. We may add that both the Courts have found that title to the goods had not passed to the J.C. Mills by that date and that it was still in the consignor and therefore the Factory was entitled to sue. We may in this connection refer briefly to the evidence on this point.

The contract between the Factory and the J. C. Mills was that delivery would be made by the seller at the godowns of the J. C. Mills. The contract also provided that the goods would be despatched by railway on the seller's risk up to the point named above (namely, the godowns of the J. C. Mills). Therefore the property

in the goods would only pass to the J. C. Mills when delivery was made at the godown and till then the consignor would be the owner of the goods and the goods would be at its risk. Ordinarily, the consignments would have been booked in the name of "self" but it seems that there was some legal difficulty in booking the consignments in the name of self and therefore the J. C. Mills agreed that the consignments might be booked in the Mills' name as consignee ; but it was made clear by the J. C. Mills that the contract would stand unaffected by this method of consignment and all risk, responsibility and liability regarding these cotton consignments would be of the Factory till they were delivered to the J. C. Mills in its godowns as already agreed upon under the contract and all losses arising from whatever cause to the cotton thus consigned would be borne by the Factory till its delivery as indicated above. This being the nature of the contract between the consignor and the consignee in the present case we have no hesitation in agreeing with the Courts below that the property in the goods was still with the Factory when the fire broke out on 8th March, 1943. Therefore the ordinary rule that it is the consignor who can sue will prevail here because it is not proved that the consignor had parted with the property in the goods, even though the consignments were booked in the name of the J. C. Mills. We are therefore of opinion that the suit of the factory was in view of these circumstances maintainable.

As to the suit by Ishwara Nand, he relies on two circumstances in support of his right to maintain the suit. In the first place, he contended that he was the owner of the goods and that was why the railway receipt was endorsed in his favour by the consignor though it was booked to "self". In the second place, it was contended that as an endorsee to a document of title he was in any case entitled to maintain the suit. The trial Court found on the evidence that it had been proved satisfactorily that Ishwara Nand was the owner of the goods. It also held that as an endorsee of a document of title he was entitled to sue. These findings of the trial Court on the evidence were accepted by the High Court in these words :—

"It was not contended before us that the finding arrived at by the learned Court below that the plaintiff had the right to sue was wrong, nor could, in view of the overwhelming evidence, such an issue be raised. The evidence on the point has already been carefully analysed by the Court below. We accept the finding and confirm it. It was also pointed out that Ishwara Nand was the endorsed consignee and in that capacity he had in any case a right to bring the suit. The correctness of this statement was not challenged before us."

Thus there are concurrent findings of the two Courts below that Ishwara Nand was the owner of the goods and that was why the railway receipt was endorsed in his favour. In these circumstances he is certainly entitled to maintain the suit. The contention that the plaintiffs in the two suits could not maintain them must therefore be rejected.

Re. (ii).

The contention under this head is that five of the consignments had been delivered to the J. C. Mills before 8th March, 1943 and therefore the railway was not responsible for any loss caused by the fire which broke out after the consignments had been delivered on 6th and 7th March, 1943. It was urged that it was the fault of the J. C. Mills that it did not remove the consignments from the railway station by 7th March, and the liability for the loss due to fire on 8th March must remain on the J. C. Mills. The trial Court had held in favour of the appellant with respect to these five consignments. But the High Court reversed that finding holding that there was no real delivery on 6th and 7th March, though the delivery book had been signed on behalf of the J. C. Mills and the railway receipts had been handed over to the railway in token of delivery having been taken. It was not disputed that the delivery book had been signed and the railway receipts had been delivered to the railway ; but the evidence was that it was the practice at that railway station, so far as the J. C. Mills was concerned, to sign the delivery book and hand over the railway receipts and give credit vouchers in respect of the freight of the consignment even before the goods had been unloaded from wagons. It appeared from

the evidence that what used to happen was that as soon the wagons arrived and they were identified as being wagons containing consignments in favour of the J. C. Mills, the consignee, namely, the J. C. Mills., used to surrender the railway receipts, sign the delivery book and give credit vouchers in respect of the receipt of freight due even before the goods were unloaded from wagons. This practice was proved from the evidence of Har Prashad (D.W. 6) who was the Assistant Goods Clerk at Morar Road at the relevant time. He was incharge of making delivery of such goods, there being no Goods Clerk there. He admitted that signature of Ishwara Nand as agent of the J. C. Mills was taken as soon as the consignments were received and identified by Ishwara Nand without being unloaded. He further admitted that there had been no actual delivery to Ishwara Nand of the consignments and this happened with respect to all the five consignments. Ishwara Nand signed the delivery book in token of having received the delivery and surrendered the railway receipts though when he did so the wagons were not even unloaded. On this evidence the High Court held that it could not be said that there was any effective delivery of the goods to the J. C. Mills through Ishwara Nand, though token delivery was made inasmuch as the delivery book had been signed and the railway receipts surrendered. It also appears from the evidence of Har Prashad that before the goods were actually removed, Ishwara Nand used to take the permission of Har Prashad to remove them. This shows that though there might be token delivery in the form of signing the delivery book and surrendering the railway receipts, actual delivery used to take place later and the removal of goods took place with the permission of Har Prashad. On this state of evidence the High Court was of the view that the so-called delivery by signing delivery book and surrendering the railway receipts was no delivery at all for till then the goods had not been unloaded. The unloading of goods is the duty of the railway and there can be no delivery by the railway till the railway has unloaded the goods. It is also clear from the evidence that even after token delivery had been made in the manner indicated above, the consignee was not authorised to remove the goods from the wagons and that it was the railway which unloaded the wagons and it was thereafter that the consignee was permitted to remove such goods with his permission as stated by Har Prashad in his evidence. The High Court therefore held that there was no clear evidence that delivery of goods had been made over to the consignee in these cases. Further there was no evidence to show that the consignee could remove the goods from the wagons without further reference to the railway, on the other hand it appeared that after such token delivery permission of Har Prashad was taken for actual removal of goods. Therefore, the High Court came to the conclusion that real delivery had not been made when the fire took place on 8th March, for the goods were till then in wagons and the railway was the only authority entitled to unload the same. Till they were unloaded by the railway, they must be in the custody of the railway and no delivery could be said to have taken place merely by signing the delivery book and surrendering the railway receipts. We are of opinion that on the evidence the view taken by the High Court is correct. Though there was a token delivery as appears from the fact that railway receipts had been surrendered and the delivery book had been signed, there was no real delivery by the railway to the consignee, for the goods had not been unloaded and were still under the control and custody of the railway and Har Prashad's evidence is that his permission had still to be taken before the goods could be actually removed by the consignee. The contention that the delivery had been made to the consignee before 8th March, 1943 must therefore in the peculiar circumstances of this case fail.

Re. (iii).

It is next contended that damages should have been awarded at the rate of Rs. 38 per bale which was the contract price between the factory and the J. C. Mills. This contract was made in November, 1942. The contract price is in our opinion no measure of damages to be awarded in a case like the present. It is well settled that it is the market price at the time the damage occurred which is the measure of damages to be awarded. It is not in dispute that the trial Court had calculated damage

on the basis of the market price prevalent on 8th March. In these circumstances this contention must also be rejected.

Re. (iv).

The next contention is that no interest could be awarded for the period before the suit on the amount of damages decreed. Legal position with respect to this is well-settled : (see *Bengal Nagpur Railway Co., Ltd. v. Ruttanji Ramji and others*¹. That decision of the Judicial Committee was relied upon by this Court in *Seth Thawardas Pherumal v. The Union of India*². The same view was expressed by this Court in *Union of India v. A. L. Rallia Ram*³. In the absence of any usage or contract, express or implied, or of any provision of law to justify the award of interest, it is not possible to award interest by way of damages. Also see recent decision of this Court in *Union of India v. Watkins Mayor & Company*⁴. In view of these decisions no interest could be awarded for the period up to the date of the suit and the decretal amount in the two suits will have to be reduced by the amount of such interest awarded.

We now come to the additional point raised in Ishwara Nand's suit. It is urged that Ishwara Nand's consignment had reached Morar Road Railway Station on 23rd February, 1943 and Ishwara Nand should have taken delivery within three days which is the period during which under the rules no wharfage is charged. The responsibility of the railway is under section 72 of the Indian Railways Act (IX of 1890) and that responsibility cannot be cut down by any rule. It may be that the railway may not charge wharfage for three days and it is expected that a consignee would take away the goods within three days. It is however urged that the railway is a carrier and its responsibility as a carrier must come to an end within a reasonable time after the arrival of goods at the destination, and thereafter there can be no responsibility whatsoever of the railway. It is further urged that three days during which the railway keeps goods without charging wharfage should be taken as reasonable time when its responsibility as a carrier ends ; thereafter it has no responsibility whatsoever. Under section 72 of the Indian Railways Act, the responsibility of the railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway is, subject to the other provisions of the Act, that of a bailee under sections 151, 152 and 161 of the Indian Contract Act (IX of 1872). This responsibility in our opinion continues until terminated in accordance with sections 55 and 56 of the Railways Act. The railway has framed rules in this connection which lay down that unclaimed goods are kept at the railway station to which they are booked for a period of not less than one month during which time the notice prescribed under section 56 of the Railways Act is issued if the owner of the goods or person entitled thereto is known. If delivery is not taken within this period, the unclaimed goods are sent to the unclaimed goods office where if they are not of dangerous, perishable or offensive character they are retained in the possession of the railway. Thereafter public sales by auction can be held of unclaimed goods which remain with the railway for over six months. This being the position under the rules so far as the application of sections 55 and 56 is concerned, it follows that even though the responsibility of the railway as a carrier may come to an end within a reasonable time after the goods have reached the destination-station, its responsibility as a warehouseman continues and that responsibility is also the same as that of a bailee. Reference in this connection is made to *Chapman v. The Great Western Railway Company*⁵. In that case what had happened was that certain goods had arrived on 24th and 25th March. On the morning of 27th March, a fire accidentally broke out and the goods were consumed by the fire. The consignor then sued the railway as common carrier on the ground that that liability still subsisted when the goods were destroyed. The question in that case was whether the liability of the railways was still as common

1 (1938) 1 M L J 640. L.R. (1937) 65 3. (1964) 3 S C R 161. A I R 1963 S C-
I A 66 : A I R. 1938 P C 67. 1685.
2 (1955) S C J. 445 (1955) 2 M L J (S C) 4 A I R. 1966 S C 75
23 (1955) 2 S C R 48. A I R 1955 S.C 468. 5. (1880) L R 5 Q B D. 278

carrier, on 27th March, or was that of warehousemen. The question was of importance in English law, for a common carrier under the English law is an insurer and is liable for the loss even though not arising from any default on his part while a warehouseman was only liable where there was want of proper care. It was held that the liability as a common carrier would come to end not immediately on the arrival of the goods at the destination but sometime must elapse between the arrival of goods and its delivery. This interval however must be reasonable and it was held in that case that reasonable time had elapsed when the fire broke out on 27th March, and therefore the railway's responsibility was not that of a carrier but only as warehouseman. The position of law in India is slightly different from that in England, for here the railway is only a bailee in the absence of any special contract and it is only when it is proved that the railway did not take such care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed, that the railway's responsibility arises. A warehouseman is also a bailee and therefore the railway will continue to be a warehouseman under the bailment, even if its responsibility as a carrier after the lapse of a reasonable time after arrival of goods at the destination comes to an end. But in both cases the responsibility in India is the same, namely that of a bailee, and negligence has to be proved. In view of the rules to which we have already referred it is clear that the railway's responsibility as a warehouseman continues even if its responsibility as a carrier comes to end after the lapse of a reasonable time after the arrival of goods at the destination. The responsibility as a warehouseman can only come to end in the manner provided by sections 55 and 56 of the Railways Act and the Rules which have been framed and to which we have already referred as to the disposal of unclaimed goods. In the present case under the Rules the goods had to remain at Morar Road Railway Station for a period of one month after their arrival there and Ishwara Nand came to take delivery of them on 10th March—well within that period. It may be that as he did not come within three days he has to pay wharfage or what is called demurrage in railway parlance, but the responsibility of the railway as a warehouseman certainly continued till 10th March, when Ishwara Nand went to take delivery of the goods. As it has been found that there had been negligence within the meaning of sections 151 and 152 of the Indian Contract Act, the railway would be liable to make good the loss caused by the fire.

The appeals therefore fail with this modification that the decretal amount would be reduced by the amount of interest awarded for the period before the date of each suit. The rest of the decree stands. The appellant will pay the respondent's costs—one set of hearing fee. In C.A. No. 603 of 1963 interest will be calculated from 6th August, 1962 in accordance with that order.

K.S.

*Appeals dismissed
with modification.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Ramchandra

.. *Appellant**

v.

Tukaram and others

.. *Respondents.*

Berar Regulation of Agricultural Leases Act (XXIV of 1951), sections 9 (1) and 8 (1) (g)—Determination of tenancy—Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (XGIX of 1958) coming into force—Landlords application for restoration of possession—Section 38 of Bombay Act if applicable.

A landlord had obtained an order, dated 2nd July, 1953, determining the tenancy from 1st April, 1958, from the Revenue Office under section 8 (1) (g) of Berar Regulation of Agricultural

* C.A. No. 616 of 1963.

Leases Act (XXIV of 1951) On account of States Reorganisation the Bombay Tenancy and Agricultural Lands (Vidharba and Kutch Areas) Act (XCIX of 1958) became applicable. The landlord thereupon applied for possession under section 19 of the Bombay Act.

Held : The application had to be dealt with on the footing that it is an application to enforce the right conferred by sections 8 and 9 of Berar Regulation of Agricultural Leases Act, 1951 and the provisions of section 38 of the Bombay Act (XCIX of 1958 have no application thereto Section 38 (4) of the Bombay Act is intended to apply only to tenancies under section 38 (1). Accordingly there was no scope for the application of the conditions and restrictions prescribed by sub-section (3) and (4) of section 38 of the Bombay Act as those provisions do not apply to proceedings to enforce rights acquired where the Berar Act was in operation

Appeal from the Judgment and Order dated the 21st September, 1961, of the Bombay High Court (Nagpur Bench) at Nagpur in Special Civil Application No. 2 of 1961.

S. G. Patwardhan, Senior Advocate, (*G. L. Sanghi*, Advocate, and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates, of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

A. G. Ratnaparkhi, Advocate, for Respondents.

The Judgment of the Court was delivered by

Shah, J.—The first respondent Tukaram was a protected lessee within the meaning of that expression in the Berar Regulation of Agricultural Leases Act XXIV of 1951—hereinafter called “the Berar Act” in respect of certain land at Mouza Karwand in the Vidarbha Region (now in the State of Maharashtra). The appellant—who is the owner of the land—served a notice under section 9 (1) of the Berar Act terminating the tenancy on the ground that he required the land for personal cultivation, and submitted an application to the Revenue Officer under section 8 (1) (g) of the Berar Act for an order determining the tenancy. The Revenue Officer determined the tenancy by order dated 2nd July, 1957, and made it effective from 1st April, 1958. In the meantime the Governor of the State of Bombay (the Vidarbha region having been incorporated within the State of Bombay by the States Reorganisation Act, 1956) issued Ordinance IV of 1957 which was later replaced by Act IX of 1958 known as the Bombay Vidarbha Region Agricultural Tenants Protection from Eviction and Amendment of Tenancy Laws) Act, 1957. By section 3 of Act IX of 1958 a ban was imposed against eviction of tenants, and by section 4 all proceedings pending at the date of the commencement of the Act, or which may be instituted during the period the Act remained in force, for termination of any tenancy, and for eviction of tenants were to be stayed on certain conditions set out in that section. Bombay Act IX of 1958 and the Berar Act XXIV of 1951, were repealed by the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act, XCIX of 1958, which may hereinafter be referred to as “the Tenancy Act”. The appellant applied on 15th May, 1958, to the Naib Tahsildar, Mhikhli for an order for “restoration of possession” of the land. By order dated 2nd August, 1960, the Naib Tahsildar ordered “restoration of possession of the land” to the appellant. In appeal the Sub-Divisional Officer, Buldana set aside the order of the Naib Tahsildar because in his view the application was not maintainable in that the appellant had failed to comply with the requirements of section 38 of the Tenancy Act. The Revenue Tribunal confirmed the order of the Sub-Divisional Officer. The appellant then moved the High Court of Judicature at Bombay praying for a writ or direction quashing the order of the Sub-Divisional Officer, Buldana and of the Revenue Tribunal and for an order for restoration of possession of the lands in pursuance of the order of Naib Tahsildar. The High Court set aside the order of the Naib Tahsildar, the Sub-Divisional Officer and the Revenue Tribunal and remanded the case to the Tahsildar for dealing with the application made by the appellant in the light of the directions given in the judgment. The appellant appeals to this Court, with certificate under Article 133 (1) (c) of the Constitution granted by the High Court.

The contention urged on behalf of the appellant is that the High Court should have restored the order passed by the Naib Tahsildar and should not have reopened the inquiry as directed in its judgment. It is necessary in the first instance to make a brief survey of the diverse statutory provisions in their relation to the progress of the dispute, which have a bearing on the question which falls to be determined. The land was originally in the Vidarbha region which before the Bombay Reorganisation Act, 1956 was a part of the State of Madhya Pradesh, and the tenancy of the land was governed by the Berar Act. The first respondent was a protected lessee in respect of the land under section 3 of the Berar Act. Section 8 of the Act imposed restrictions on termination of protected leases. It was provided that notwithstanding any agreement, usage, decree or order of a Court of law, the lease of any land held by a protected lessee shall not be terminated except under orders of a Revenue Officer made on any of the grounds contained therein. Even if the landlord desired to obtain possession of the land for *bona fide* personal cultivation, he had to obtain an order in that behalf under section 8 (1) (g). Section 9 enabled the landlord to terminate the lease of a protected lessee if he required the land for personal cultivation by giving notice of the prescribed duration and setting out the reasons for determination of the tenancy. A tenant served with the notice under sub-section (1) could under sub-section (3) apply to the Revenue Officer for a declaration that the notice shall have no effect or for permission to give up some other land of the same landholder in lieu of the land mentioned in the notice. Sub-sections (4) (5) (6) (7) and (8) dealt with the procedure and powers of the Revenue Officer. The landlord had, after serving a notice under section 9 (1), to obtain an order under section 8 (1) (g) that possession was required by him *bona fide* for personal cultivation. Section 19 of the Berar Act prescribed the procedure for ejectment of a protected lessee. Sub-section (1) provided :

"A landholder may apply to the Revenue Officer to eject a protected lessee against whom an order for the termination of the lease has been passed under sections 8 or 9."

Sub-section (2) enabled a tenant dispossessed of land otherwise than in accordance with the provisions of the Act to apply to the Revenue Officer for restoration of the possession. By sub-section (3) it was provided :

"On receipt of an application under sub-section (1) or (2), the Revenue Officer may, after making such summary enquiry as he deems fit, pass an order for restoring possession of the land to the landholder or the protected lessee as the case may be and may take such steps as may be necessary to give effect to his order."

The appellant had obtained from the Revenue Officer concerned an order under section 8 (1) (g) determining the tenancy effective from 1st April, 1958. But before that date Ordinance IV of 1957 was promulgated. This Ordinance was later replaced by Bombay Act IX of 1958. By section 4 of Bombay Act IX of 1958 all proceedings either pending at the date of commencement of the Act or which may be instituted (during the period the Act remained in force) for termination of the tenancies were stayed.

The Tenancy Act (Bombay Act XCIX of 1958) which was brought into force on 30th December, 1958, repealed Bombay Act IX of 1958 and the Berar Act and made diverse provisions with regard to protection of tenants. By section 9 of the Tenancy Act it was provided that no tenancy of any land shall be terminated merely on the ground that the period fixed for its duration whether by agreement or otherwise had expired, and by section 19 it was provided that notwithstanding any agreement usage, decree or order of a Court of law, the tenancy of any land held by a tenant shall not be terminated unless certain conditions specified therein were fulfilled. Section 36 of the Tenancy Act set up the procedure to be followed, *inter alia*, for obtaining possession from a tenant after determination of the tenancy, and sub-section (2) enacted that no landlord shall obtain possession of any land, dwelling house or site used for any allied pursuit held by a tenant except under an order of the Tahsildar. By sub-section (3) it was provided that on receipt of an application under sub-section (1) the Tahsildar shall, after holding an inquiry, pass such order thereon as he deems fit provided that where an application under sub-section (2) is made by a landlord in pursuance of the right conferred on him under section 38, the Tahsildar may first decide as preliminary issue, whether the conditions specified

in clauses (c) and (d) of sub-section (3), and clauses (b), (c) and (d) of sub-section (4) of that section are satisfied. That takes us to section 38. By the first sub-section, as it was originally enacted, it was provided :

“Notwithstanding anything contained in section 9 or 19 but subject to the provisions of sub-sections (2) to (5), a landlord may after giving to the tenant one year's notice in writing at any time within two years from the commencement of this Act and making an application for possession under sub-section (2) of section 36, terminate the tenancy of the land held by a tenant other than an occupancy tenant if he *bona fide* requires the land for cultivating it personally.”

(Amendment of this sub-section by Maharashtra Act V of 1961 is not material for the purpose of this appeal.) By sub-section (3) it was provided that the right of a landlord to terminate the tenancy under sub-section (1) shall be subject to the conditions contained in clauses (a) to (e) (which need not, for the purpose of this appeal, be set out). Sub-section (4) imposed on the right of the landlord certain restrictions in terminating the tenancy. A landlord may not terminate a tenancy (a) so as to reduce the area with the tenant below a certain limit, or (b) contravene the provisions of the Bombay Prevention of Fragmentation Act, or (c) where the tenant is a member of a co-operative farming society, or (d) where the tenant is a co-operative farming society. Sub-section (4-A) dealt with the special case of a member of armed forces ceasing to be a member of the serving force. Sub-sections (5), (6) and (7) made certain incidental provisions. By sub-section (1) of section 132, amongst others, the Berar Act and Bombay Act IX of 1958 were repealed. By sub-section (2) it was provided that nothing in sub-section (1) shall, save as expressly provided in the Act, affect or be deemed to affect (i) any right, title, interest, obligation or liability already acquired, or accrued before the commencement of the Act or (ii) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability or anything done or suffered before the commencement of the Act, and any such proceedings shall be instituted, continued and disposed of, as if Act XCIX of 1958 had not been passed. Sub-section, (3) provided :

“Notwithstanding anything contained in sub-section (1)—

(a) all proceedings for the termination of the tenancy and ejectment of a tenant or for the recovery or restoration of the possession of the land under the provisions of the enactments so repealed, pending on the date of the commencement of this Act before a Revenue Officer or in appeal or revision before any appellate or revising authority shall be deemed to have been instituted and pending before the corresponding authority under this Act and shall be disposed of in accordance with the provisions of this Act, and

(b) * * * * *

As from 30th December, 1958, the Berar Act ceased to be in operation. But by sub-section (2) of section 132 any right, title, interest, obligation or liability already acquired before the commencement of the Tenancy Act remained enforceable and any legal proceedings in respect of such right, title, interest, obligation or liability could be instituted, continued and disposed of as if Bombay Act XCIX of 1958 had not been passed. But to this reservation an exception was made by sub-section (3) that a proceeding for termination of tenancy and ejectment of the tenant or for recovery or restoration of possession of the land under any repealed provisions, pending on the date of the commencement of Act XCIX of 1958 before a Revenue Officer, was to be deemed to have been instituted and pending before the corresponding authority under the Tenancy Act and was to be disposed of in accordance with the provisions of that Act. Therefore when a proceeding was pending for termination of the tenancy and ejectment of a tenant the proceeding had to be disposed of in accordance with the provisions of the Tenancy Act, notwithstanding anything contained in sub-section (2). If the expression “proceedings * * * pending on the date of commencement of this Act” in section 132 (3) (a) be literally interpreted, a somewhat anomalous situation may result. An application under section 19 of the Berar Act pursuant to an order under sections 8 and 9, instituted before the Tenancy Act was enacted, will have to be disposed of in accordance with the provisions of the Tenancy Act, but if no proceeding under section 19 be commenced the proceeding would not be governed in terms by sub-section (3) and would by the operation of sub-section (2) be instituted and continued as if the Tenancy Act was not passed. This problem engaged the attention of the

Bombay High Court in *Jayantraj Kanakmal Zambad and another v. Hari Dagdu and others*¹ in which the facts were closely paralleled to the facts in the present case. An order determining the lease under sections 8 and 9 of the Berar Act was obtained by the landlord before the Tenancy Act was enacted, and at a time when Bombay Act IX of 1958 was in force, and proceedings were started by the landlord for obtaining possession from the tenant, after the Tenancy Act was brought into force. The High Court held that the application by the landlord for possession against the tenant whose tenancy was determined by an order under the Berar Act has, if instituted after the Tenancy Act was brought into force, to be decided according to the provisions of the latter Act by virtue of section 132 (3) and not under the Berar Act, and that an order for termination of the lease under section 8 does not come to an end until an order is made under sub-section (3) of section 19. The Court therefore in that case avoided the anomaly arising from the words of sub-section (3) by holding that an order made under section 8 or under section 9 of the Berar Act relating to termination of a lease does not terminate the proceeding, and it comes to an end when an Order under section 19 of the Act is made.

The High Court in the judgment under appeal, following the decision in *Jayantraj Kanakmal Zambad's case*¹ held that the application filed by the appellant purporting to be under section 36 (2) of the Tenancy Act must be regarded as an application under section 19 of the Berar Act and therefore be deemed to be a continuation of the application under sections 8 and 9 of the Berar Act which was pending at the date when the Tenancy Act was brought into force, and to such an application section 38 (1) did not apply, but by virtue of sub-section (3) clause (a) of section 132 the application had to be disposed of in accordance with the provisions of the Tenancy Act, thereby making the provisions of section 38 (3) and section 38 (4) applicable thereto. Mr. Patwardhan for the appellant has, for the purpose of this appeal, not sought to canvas the correctness of the view of the judgment in *Jayantraj Kanakmal Zambad's case*¹, but has submitted that the High Court has not correctly interpreted section 132 (3) of the Tenancy Act.

The appellant had acquired a right to obtain possession of the land on determination made by the Revenue Officer by order dated 2nd July, 1957, and a legal proceeding in respect thereof could be instituted or continued by virtue of sub-section (2) of section 132 as if the Tenancy Act had not been passed. The exception made by sub-section (3) of section 132 in respect of proceedings for termination of the tenancy and ejectment of a tenant which are pending on the date of the commencement of the Tenancy Act is limited in its content. Proceedings which are pending are to be deemed to have been instituted and pending before the corresponding authority under the Act and must be disposed of in accordance with the provisions of the Tenancy Act. By the use of the expression "shall be disposed of in accordance with the provisions of this Act" apparently the Legislature intended to attract the procedural provisions of the Tenancy Act, and not the conditions precedent to the institution of fresh proceedings. To hold otherwise would be to make a large inroad upon sub-section (2) of section 132 which made the right, title or interest already acquired by virtue of any previous order passed by competent authority unenforceable, even though it was expressly declared enforceable as if the Tenancy Act had not been passed.

The High Court was, in our judgment, right in holding that the application filed by the appellant for obtaining an order for possession against the first respondent must be treated as one under section 9 of the Berar Act, and must be tried before the corresponding authority. Being a pending proceeding in respect of a right acquired before the Act, it had to be continued and disposed of as if the Tenancy Act had not been passed [sub-section (2)], subject to the reservation in respect of two matters relating to the competence of the officers to try the proceeding and to the procedure in respect of the trial. The appellant had obtained an order determining the tenancy of the first respondent. That order had to be enforced in the

1. I.L.R. (1962) Bom. 42 (F.B.).

mannar provided by section 19 (1) *i.e.*, the Revenue Officer had to make such summary inquiry as he deemed fit, and had to pass an order for restoring possession of the land to the landholder and to take such steps as may be necessary to give effect to his order. Since the repeal of the Berar Act the proceeding pending before the Revenue Officer would stand transferred to the Tahsildar. The Tahsildar was bound to give effect to the rights already acquired before the Tenancy Act was enacted, and in giving effect to those rights he had to follow the procedure prescribed by the Tenancy Act. Between sections 19 (3) of the Berar Act and 36 (3) of the Tenancy Act in the matter of procedure there does not appear to us any substantial difference. Under the Berar Act a *summary inquiry* has to be made by the Revenue Officer, whereas under the Tenancy Act the Tahsildar must hold an inquiry and pass such order (consistently with the rights of the parties) as he deems fit. But to the trial of the application for enforcement of the right acquired under the Berar Act, section 38 of the Tenancy Act could not be attracted. Section 38 authorises the landlord to obtain possession of the land from a tenant, if the landlord *bona fide* required the land for cultivating it personally. In order to effectuate that right, the landlord must give a notice of one year's duration in writing and make an application for possession under section 36 within the prescribed period. The section is in terms prospective and does not purport to affect rights acquired before the date on which the Tenancy Act was brought into force. The High Court was therefore also right in observing :

"The notice referred to in sub-section (1) of section 38 could not obviously have been given in respect of proceedings which were pending or which are deemed to have been pending on the date of the commencement of this Act. It does not also appear that it was the intention of the Legislature that such proceedings should be kept pending for a further period until a fresh notice as required by sub-section (1) of section 38 had been given * * *. For the same reasons, the proviso to sub-section (2) of section 36 will not apply in such cases "

But we are unable to agree with the High Court that sub-sections (3) and (4) of section 38 apply to an application filed or deemed to be filed under section 19 of the Berar Act. The High Court appears to be of the view that by the use of the expression "shall be disposed of in accordance with the provisions of this Act" it was intended that "all the provisions of the Act, which would apply to an application made under sub-section (2) of section 36, would also apply to applications which are deemed to have been made under this section", and therefore it followed that sub-sections (3) and (4) of section 38 applied to all applications for obtaining possession of the land for personal cultivation made under section 19 of the Berar Act which were pending or which were deemed to have been pending on the date of the commencement of the Tenancy Act. It may be noticed that sub-section (3) of section 38 in terms makes the right of the landlord to terminate a tenancy under sub-section (1), subject to conditions mentioned therein. If there be no determination of the tenancy by notice in writing under sub-section (1), sub-section (3) could have no application.

The words of sub-section (4) are undoubtedly general. But the setting in which the sub-section occurs clearly indicates that it is intended to apply to tenancies determined under section 38 (1). Large protection which was granted by section 19 of the Tenancy Act has been withdrawn from tenants who may be regarded as contumacious. By section 38 (1) a landlord desiring to cultivate the land personally is given the right to terminate the tenancy, but the right is made subject to the conditions prescribed in sub-section (3) and the Legislature has by sub-section (4) (a) sought to make an equitable adjustment between the claims of the landlord and the tenant. If sub-section (4) be read as imposing a restriction on the determination of all tenancies, it would imply grant of protection to a contumacious tenant as well. The Legislature could not have intended that in making equitable adjustments between the rights of landlords and tenants contumacious tenants who have disentitled themselves otherwise to the protection of section 19 should still be benefited. Again if sub-section (4) be read as applying to determination of every agricultural tenancy, its proper place would have been in sub-section (3) of section 36 and the proviso thereto would not have been drafted in the manner it is found in the Act. By clauses (c) and (d) of sub-section (4) tenants who are co-operative

societies or members of co-operative societies are not liable to be evicted, and if the opening words of sub-section (4) are intended to be read as applicable to termination of all tenancies, whatever the reason, we would have expected some indication to that effect in section 19 of the Tenancy Act. Again inclusion of sub-sections (2) to (5) in the *non obstante* clause in sub-section (1) supports the view that the expression "in no case a tenancy shall be terminated" being part of an integrated scheme means that a tenancy determined for reasons and in the manner set out in sub-section (1) of section 38 must be determined consistently with sub-section (4), but where the determination of the tenancy is not under sub-section (1) of section 38, sub-section (4) has no application.

The application made by the appellant is undoubtedly one for ejectment of the tenant and for recovery of possession. The Naib Tahsildar was competent to entertain the application. It is true that the application was originally filed under sections 8 and 9 of the Berar Act on the ground that the landlord required the land *bona fide* for his personal cultivation, but once an order was passed under section 8 (1) (g) by the Revenue Officer, the only inquiry contemplated to be made on an application under section 19 was a summary inquiry before an order for possession was made in favour of the landlord. At that stage, there was no scope for the application of the conditions and restrictions prescribed by sub-sections (3) and (4) of section 38, for, in our view, those provisions do not apply to proceedings to enforce rights acquired when the Berar Act was in operation.

We therefore modify the order passed by the High Court and direct that the orders passed by the Tahsildar and the Revenue Tribunal will be set aside and the matter will be remanded to the Tahsildar for dealing with the application on the footing that it is an application to enforce the right conferred by sections 8 and 9 of the Berar Regulation of Agricultural Leases Act, 1951 and the provisions of section 38 of the Bombay Act XCIX of 1958 have no application thereto. There will be no order as to costs in this appeal.

K.S.

Order modified.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction)

PRESENT :—K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

The State of Maharashtra

.. Appellant*

v.

Mayer Hans George

.. Respondent.

Foreign Exchange Regulation Act (VII of 1947), sections 8 (1) and 23 (1-A)—Contravention—Offence—mens rea—If necessary—Notification under by Reserve Bank, dated 8th November, 1962, giving general permission for through transit of gold—Proviso imposing condition that the gold (which is on through transit from a place which is outside the territory of India is declared in the manifest for transit as 'same bottom cargo' or 'transhipment cargo'—Gold found on passenger in plane at Santa Cruz Air Port on 28th November, 1962, without declaration of it in manifest—Knowledge of notification—If essential for offence (by a person from who left on 27th November, 1962, passing through India) under Foreign Exchange Regulation Act—Publication of Notification in Gazette on 24th November, 1962—If publication sufficient to impute knowledge to the Foreigner.

On 8th November, 1962, the Reserve Bank modified the Notification of 1948 (giving general permission exempting bringing of gold in through transit from places outside India to places similarly situated) and added an additional condition for exemption *viz* ; that the gold must be declared in the manifest of air craft as 'same bottom cargo' or 'transhipment cargo'. The Notification was published in the Gazette on 24th November, 1962.

Where the respondent who left Zurich on 27th November was found in possession of gold bars concealed in a specially designed coat (with many pockets) worn by him at the Santa Cruz Air Port on the morning of 28th November, 1962, without the requisite declaration in the manifest,

* Cr.A. No. 218 of 1963.

8th May, 1964 and 21st August, 1964.

Held : (with *Subba Rao, J.* dissenting) that the respondent was guilty of an offence of contravening the prohibition under section 8 (1) of the Foreign Exchange Regulation Act (1947).

The very object and purpose of the Act and its effectiveness as an instrument for the prevention of smuggling would be entirely frustrated if a condition were to be read into section 8 (1) or section 23 (1-A) of the Act qualifying the plain words of the enactment that the accused should be proved to have knowledge that he was contravening the law before he could be held to have contravened the provision. The Notification was published in India in the Gazette on the 24th November, 1962, and the respondent who left Zurich on 27th November, 1962, by the plane did not have actual notice of the Notification of the Reserve Bank, dated 8th November, 1962. But the ignorance of the respondent—a foreigner—is wholly irrelevant and it makes no difference to his liability to be proceeded against for contravention of section 8 (1) of the Act.

The gold of the quantity and in the form in which it was carried would certainly not be "personal luggage" in the sense in which "luggage" is understood. It cannot be contended that it is not cargo—either "bottom cargo" or "transhipment cargo" and so need not be entered in the manifest.

There is undoubtedly a certain amount of uncertainty in the law except in cases where specific provision in that behalf is made in individual statutes as to (a) when subordinate legislation could be said to have been passed and (b) when it comes into effect. The position in England has been clarified by the Statutory Instruments Act of 1946. It is desirable to have a similar legislation in India.

Per Subba Rao, J.—A person cannot be held to be guilty of contravention of the provisions of section 8 of the Act read with the Notification, dated 8th November, 1962, unless he has knowingly brought into India gold without complying with the terms of the proviso to the Notification.

Appeal by Special Leave from the Judgment and Order dated the 10th December, 1963, of the Bombay High Court in Criminal Appeal No. 653 of 1963.

H. N. Sanyal, Solicitor General of India, and *N. S. Bindra*, Senior Advocate, (*R. H. Dhebar*, Advocate, with them), for Appellant.

Soli Sohrabji, Advocate, *A. J. Rana*, Advocate, Bombay High Court and (*J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Naram*, Advocates of *J. B. Dadachanji & Co.*), for Respondent.

The Court made the following

ORDER† :—By majority, the appeal is allowed and the conviction of the respondent is restored : but the sentence imposed on him is reduced to the period already undergone. The respondent shall forthwith be released and the bail bond, if any, cancelled. Reasons will be given in due course.

The Court delivered the following Judgments ‡

Subba Rao, J.—I regret my inability to agree. This appeal raises the question of the scope of the ban imposed by the Central Government and the Central Board of Revenue in exercise of the powers conferred on them under section 8 of the Foreign Exchange Regulation Act, 1947 (VII of 1947), hereinafter called the Act, against persons transporting prohibited articles through India.

In exercise of the powers conferred under section 8 of the Act the Government of India issued on 25th August, 1948, a notification that gold and gold articles, among others, should not be brought into India or sent to India except with the general or special permission of the Reserve Bank of India. On the same date the Reserve Bank of India issued a notification giving a general permission for bringing or sending any such gold provided it was on through transit to a place outside India. On 24th November, 1962, the Reserve Bank of India published a notification dated 8th November, 1962, in supersession of its earlier notification placing further restrictions on the transit of such gold to a place outside the territory of India, one of them being that such gold should be declared in the "Manifest" for transit in the "same bottom cargo" or "transhipment cargo." The respondent left Zurich by a Swiss air plane on 27th November, 1962, which touched Santa Cruz Air Port at 6-05 A.M. on the next day. The Customs Officers, on the basis of previous information, searched for the respondent and found him sitting in the plane. On a search of the person of the respondent it was found that he had put on a jacket containing 28 compartments and in 19 of them he was carrying gold slabs weighing approximately 34 kilos. It was also found that the respondent was

a passenger bound for Manila. The other facts are not necessary for this appeal. Till 24th November, 1962, there was a general permission for a person to bring or send gold into India, if it was on through transit to a place outside the territory of India ; but from that date it could not be so done except on the condition that it was declared in the "Manifest" for transit as "same bottom cargo" or "transhipment cargo." When the respondent boarded the Swiss plane at Zurich on 27th November, 1962, he could not have had knowledge of the fact that the said condition had been imposed on the general permission given by the earlier notification. The gold was carried on the person of the respondent and he was only sitting in the plane after it touched the Santa Cruz Airport. The respondent was prosecuted for importing gold into India under section 8 (1) of the Act, read with section 23 (1-A) thereof, and under section 167 (8) (i) of the Sea Customs Act. The learned Presidency Magistrate found the accused "guilty" on the two counts and sentenced him to rigorous imprisonment for one year. On appeal the High Court of Bombay held that the second proviso to the relevant notification issued by the Central Government did not apply to a person carrying gold with him on his body, that even if it applied, the *mens rea* being a necessary ingredient of the offence, the respondent, who brought gold into India for transit to Manila, did not know that during the crucial period such a condition had been imposed and, therefore, he did not commit any offence. On those findings, it held that the respondent was not guilty under any of the aforesaid sections. In the result the conviction made by the Presidency Magistrate was set aside. This appeal has been preferred by Special Leave against the said order of the High Court.

Learned Solicitor General, appearing for the State of Maharashtra contends that the Act was enacted to prevent smuggling of gold in the interests of the economic stability of the country and, therefore, in construing the relevant provisions of such an Act there is no scope for applying the presumption of common law that *mens rea* is a necessary ingredient of the offence. The object of the statute and the mandatory terms of the relevant provisions, the argument proceeds, rebut any such presumption and indicate that *mens rea* is not a necessary ingredient of the offence. He further contends that on a reasonable construction of the second proviso of the notification dated 8th November, 1962, issued by the Board of Revenue, it should be held that the general permission for bringing gold into India is subject to the condition laid down in the second proviso and that, as in the present case the gold was not disclosed in the Manifest, the respondent contravened the terms thereof and was, therefore, liable to be convicted under the aforesaid sections of the Foreign Exchange Act. No argument was advanced before us under section 168 (8) (i) of the Sea Customs Act and, therefore, nothing need be said about that section.

Learned Counsel for the respondent sought to sustain the acquittal of his client practically on the grounds which found favour with the High Court. I shall consider in detail his argument at the appropriate places of the judgment.

The first question turns upon the relevant provisions of the Act and the Notifications issued thereunder. At the outset it would be convenient to read the relevant parts of the said provisions and the Notifications, for the answer to the question raised depends upon them.

Section 8—(1) The Central Government may, by notification in the Official Gazette, order that, subject to such exemptions, if any, as may be contained in the notification, no person shall except with the general or special permission of the Reserve Bank and on the payment of the fee if any, prescribed bring or send into India any gold

Explanation—The bringing or sending into any port or place in India of any such article as aforesaid intended to be taken out of India without being removed from the ship or conveyance in which it is being carried shall nonetheless be deemed to be bringing or as the case may be, sending into India of that article for the purpose of this section.

In exercise of the power conferred by the said section on the Central Government, it had issued the following notification dated 25th August, 1948 (as amended upto 31st July, 1958) :

"In exercise of the powers conferred by sub-section (1) of section 8 of the Foreign Exchange Regulation Act, 1947 (VII of 1947) and in supersession of the Notification of the Government

of India.....the Central Government is pleased to direct that, except with the general or special permission of the Reserve Bank no person shall bring or send into India from any place out of India —

(a) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not,

The Reserve Bank of India issued a Notification dated 25th August, 1948, giving a general permission in the following terms :

“.....the Reserve Bank of India is hereby pleased to give general permission to the bringing or sending of any such gold or silver by sea or air into any port in India provided that the gold or silver (a) is in through transit to a place which is outside both (i) the territory of India and (ii) the Portuguese Territories which are adjacent to or surrounded by the territory of India and (b) is not removed from the carrying ship or aircraft, except for the purpose of transshipment.”

On 8th November, 1962, in supersession of the said notification the Reserve Bank of India issued the following notification which was published in the official Gazette of 24th November, 1962 :

“.....the Reserve bank of India gives general permission to the bringing or sending of any of the following articles, namely,

(a) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not,

* * * * *

into any port or place in India when such articles is on through transit to a place which is outside the territory of India. Provided that such article is not removed from the ship or conveyance in which it is being carried except for the purpose of transshipment ;

Provided further that it is declared in the manifest for transit as same bottom cargo or transshipment cargo ”

The combined effect of the terms of the section and the Notifications may be stated thus : No gold can be brought in or sent to India though it is on through transit to a place which is outside India except with the general or special permission of the Reserve Bank of India. Till 24th November, 1962, under the general permission given by the Reserve Bank of India such gold could be brought in or sent to India if it was not removed from the ship or aircraft except for the purpose of transshipment. But from that date another condition was imposed thereon, namely, that such gold shall be declared in the manifest for transit as “ same bottom cargo ” or “ transshipment cargo .”

Pausing here, it will be useful to notice the meaning of some of the technical words used in the second proviso to the notification. The object of maintaining a transit manifest for cargo, as explained by the High Court, is twofold, namely:

“to keep a record of goods delivered into the custody of the carrier for safe carriage and to enable the Customs Authorities to check and verify the dutiable goods which arrive by a particular flight ”

“ Cargo ” is a shipload or the lading of a ship. No statutory or accepted definition of the word “ cargo ” has been placed before us. While the appellant contends that all the goods carried in a ship or plane is cargo, the respondent’s Counsel argues that nothing is cargo unless it is included in the manifest. But what should be included and what need not be included in the manifest is not made clear. It is said that the expressions “ same bottom cargo ” and “ transit cargo ” throw some light on the meaning of the word “ cargo.” Article 606 of the Chapter on “ Shipping and Navigation ” in Halsbury’s Laws of England, 3rd edition, Volume 35, at page 426, brings out the distinction between the two types of cargo. If the cargo is to be carried to its destination by the same conveyance throughout the voyage or journey it is described as “ same bottom cargo.” On the other hand, if the cargo is to be transhipped from one conveyance to another during the course of transit, it is called “ transshipment cargo.” This distinction also does not throw any light on the meaning of the word “ cargo ”. If the expression “ cargo ” takes in all the goods carried in the plane, whether it is carried under the personal care of the passenger or entrusted to the care of the officer in charge of the cargo, both the categories of cargo can squarely fall under the said two heads. Does the word “ manifest ” throw any light ? Inspector Darine Bejan Bhappu says in his evidence that manifest for transit discloses only such goods as are unaccompanied baggage

but on the same flight and that "accompanied baggage is never manifested as Cargo Manifest". In the absence of any material or evidence to the contrary, this statement must be accepted as a correct representation of the actual practice obtaining in such matters. But that practice does not prevent the imposition of a statutory obligation to include accompanied baggage also as an item in the manifest if a passenger seeks to take advantage of the general permission given thereunder. I cannot see any inherent impossibility implicit in the expression "cargo" compelling me to exclude an accompanied baggage from the said expression.

Now let me look at the second proviso of the notification dated 8th November 1962. Under section 8 of the Act there is ban against bringing or sending into India gold. The notification lifts the ban to some extent. It says that a person can bring into any port or place in India gold when the same is on through transit to a place which is outside the territory of India, provided that it is declared in the manifest for transit as "same bottom cargo or transshipment cargo." It is, therefore, not an absolute permission but one conditioned by the said proviso. If the permission is sought to be availed of, the condition should be complied with. It is a condition precedent for availing of the permission.

Learned Counsel for the respondent contends that the said construction of the proviso would preclude a person from carrying small articles of gold on his person if such article could not be declared in the manifest for transit as "same bottom cargo" or "transshipment cargo" and that could not have been the intention of the Board of Revenue. On that basis, the argument proceeds, the second proviso should be made to apply only to such cargo to which the said proviso applies and the general permission to bring gold into India would apply to all other gold not covered by the second proviso. This argument, if accepted, would enable a passenger to circumvent the proviso by carrying gold on his body by diverse methods. The present case illustrates how such a construction can defeat the purpose of the Act itself. I cannot accept such a construction unless the terms of the Notification compel me to do so. I do not see any such compulsion. The alternative construction for which the appellant contends no doubt prevents a passenger from carrying with him small articles of gold. The learned Solicitor General relies upon certain rules permitting a passenger to bring into India on his person small articles of gold, but *ex facie* those rules do not appear to apply to a person passing through India to a foreign country. No doubt to have international good will the appropriate authority may be well advised to give permission for such small articles of gold or any other article for being carried by a person with him on his way through India to foreign countries. But for one reason or other, the general permission in express terms says that gold shall be declared in the manifest and I do not see, nor any provision of law has been placed before us, why gold carried on a person cannot be declared in the manifest if that person seeks to avail himself of the permission. Though I appreciate the inconvenience and irritation that will be caused to passengers *bona fide* passing through our country to foreign countries for honest purposes, I cannot see my way to interpret the second proviso in such a way as to defeat its purpose. I, therefore, hold that on a fair construction of the Notification dated 8th November, 1962, that the general permission can be taken advantage of only by a person passing through India to a foreign country if he declares the gold in his possession in the manifest for transit as "same bottom cargo" or "transshipment cargo."

The next argument is that *mens rea* is an essential ingredient of the offence under section 8 of the Act, read with section 23 (1-A) (a) thereof. Under section 8 no person shall, except with the general or special permission of the Reserve Bank of India, bring or send to India any gold. Under the Notification dated 8th November, 1962, and published on 24th November, 1962, as interpreted by me, such gold to earn the permission shall be declared in the manifest. The section, read with the said Notification, prohibits bringing or sending to India gold intended to be taken out of India unless it is declared in the manifest. If any person brings into or sends to India any gold without declaring it in such manifest, he will be doing an act in contravention of section 8 of the Act read with the Notification and, therefore, he will be

contravening the provisions of the Act. Under section 23 (1-A) (a) of the Act he will be liable to punishment of imprisonment which may extend to two years or with fine or with both. The question is whether the intention of the Legislature is to punish persons who break the said law without a guilty mind. The doctrine of *mens rea* in the context of statutory crimes has been the subject-matter of many decisions in England as well as in our country. I shall briefly consider some of the important standard text books and decisions cited at the Bar to ascertain its exact scope

In "Russell on Crime", 11th edition Volume 1, it is stated at page 64 :

"..... there is a presumption [that in any statutory crime the common law mental element, *mens rea*, is an essential ingredient."

On the question how to rebut this presumption, the learned author points out that the policy of the Courts is unpredictable. I shall notice some of the decisions which appear to substantiate the author's view. In Halsbury's Laws of England, 3rd edition, Volume, 10, in para. 508, at page 273, the following passage appears :

"A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may require a specific intention, malice, knowledge, wilfulness, or recklessness. On the other hand, it may be silent as to any requirement of *mens rea*, and in such a case in order to determine whether or not *mens rea* is an essential element of the offence, it is necessary to look at the objects and terms of the statute."

This passage also indicates that the absence of any specific mention of a state of mind as an ingredient of an offence in a statute is not decisive of the question whether *mens rea* is an ingredient of the offence or not: it depends upon the objects and the terms of the statute. So too, Archbold in his book on "Criminal Pleading, Evidence and Practice", 35th edition, says much to the same effect at page 48 thus :

"It has always been a principle of the common law that *mens rea* is an essential element in the commission of any criminal offence against the common law. . . . In the case of statutory offences it depends on the effect of the statute. . . . There is a presumption that *mens rea* is an essential ingredient in a statutory offence, but this presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals."

The leading case on the subject in *Sherras v. De Rutzen*¹. Section 16 (2) of the Licensing Act, 1872, prohibited a licensed victualler from supplying liquor to a Police Constable while on duty. It was held that that section did not apply where a licensed victualler *bona fide* believed that the Police Officer was off duty. Wright, J., observed :

"There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act is an essential ingredient in every offence ; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered "

This sums up the statement of the law that has been practically adopted in later decisions. The Privy Council in *Jacob Bruhn v. The King on the Prosecution of the Opium Farmer*², construed section 73 of the Straits Settlements Opium Ordinance, 1906. Section 73 of the said Ordinance stated that if any ship was used for importation, landing, removal, carriage or conveyance of any opium or chandu contrary to the provisions of the said Ordinance or of the rules made thereunder, that master and owner thereof would be liable to a fine. The section also laid down the rule of evidence that if a particular quantity of opium was found in the ship that was evidence that the ship had been used for importation of opium, unless it was proved to the satisfaction of the Court that every reasonable precaution had been taken to prevent such use of such ship and that none of the officers, their servants or the crew or any persons employed on board the ship, were implicated therein. The said provisions are very clear ; the offence is defined, the relevant evidence is described and the burden of proof is placed upon the accused. In the context of that section the Judicial Committee observed :

"By this Ordinance every person other than the opium farmer is prohibited from importing or exporting chandu. If any other person does so, he *prima facie* commits a crime under the provisions of the Ordinance. If it be provided in the Ordinance, as it is, that certain facts, if esta-

1 L R. (1895) 1 Q B. 918, 921.

2 L R. (1909) A C 317, 324.

blished, justify or excuse what is *prima facie* a crime, then the burden of proving those facts obviously rests on the party accused. In truth, this objection is but the objection in another form, that knowledge is a necessary element in crime, and it is answered by the same reasoning."

It would be seen from the aforesaid observation that in that case *mens rea* was not really excluded but the burden of proof to negative *mens rea* was placed upon the accused. In *Pearks' Dairies, Lim. v. Tottenham Food Control Committee*¹, the Court of Appeal considered the scope of Regulations 3 and 6 of the Margarine (Maximum Prices) Order, 1917. The appellants' assistant, in violation of their instructions, but by an innocent mistake, sold margarine to a customer at the price of 1 sh. per lb. giving only 14½ ozs. by weight instead of 16 ozs. The appellants were prosecuted for selling margarine at a price exceeding the maximum price fixed and one of the contentions raised on behalf of the accused was that *mens rea* on the part of the appellants was not an essential element of the offence. Lord Coleridge, J., cited with approval the following passage of Channell, J., in *Pearks, Gunston & Tee, Lim. v. Ward*²:

"But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is, that the Legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any *mens rea* or not, and whether or not he intended to commit a breach of the law." Where the act is of this character then the master, who, in fact, has done the forbidden thing through his servant, is responsible and is liable to a penalty. There is no reason why he should not be, because the very object of the Legislature was to forbid the thing absolutely."

This decision states the same principle in a different form. It also places emphasis on the terms and the object of the statute in the context of the question whether *mens rea* is excluded or not. The decision in *Rex v. Jacobs*³, arose out of an agreement to sell price-controlled goods at excess price. The defence was that the accused was ignorant of the proper price. The Court of Criminal Appeal held that in the summing up the direction given by the Judge to the jury that it was not necessary that the prosecution should prove that the appellants knew what the permitted price was but that they need only show in fact a sale at an excessive price had taken place, was correct in law. This only illustrates that on a construction of the particular statute, having regard to the object of the statute and its terms, the Court may hold that *mens rea* is not a necessary ingredient of the offence. In *Brend v. Wood*⁴, dealing with an emergency legislation relating to fuel rationing, Goddard, C.J. observed:

"There are statutes and regulations in which Parliament has seen fit to create offences and make people responsible before criminal Courts although there is an absence of *mens rea*, but it is certainly not the Court's duty to be acute to find that *mens rea* is not a constituent part of a crime. It is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

This caution administered by an eminent and experienced judge in the matter of construing such statutes cannot easily be ignored. The Judicial Committee in *Srinivas Mall Barroloya v. King-Emperor*⁵, was dealing with a case in which one of the appellants was charged with an offence under the Rules made by virtue of the Defence of India Act, 1939, of selling salt at prices exceeding those prescribed under the Rules, though the sales were made without the appellant's knowledge by one of his servants. Lord Parcq, speaking for the Board, approved the view expressed by Goddard, C.J., in *Brend v. Wood*⁴, and observed:

"Their Lordships agree with the view which was recently expressed by the Lord Chief Justice of England, when he said: "It is in my opinion of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that, unless the statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind."

1. (1919) 88 L.J.K.B. 623, 626.

2. (1902) 71 L.J.K.B. 656.

3. L.R. (1914) K.B. 417.

4. (1946) 62 The Times L.R. 462, 463.

5. I.L.R. 26 Pat. 460 : (1947) 2 M.L.J.-328 (P.C.).

The acceptance of the principle by the Judicial Committee that *mens rea* is a constituent part of a crime unless the statute clearly or by necessary implication excludes the same, and the application of the same to a welfare measure is an indication that the Court shall not be astute in construing a statute to ignore *mens rea* on a slippery ground of a welfare measure unless the statute compels it to do so. Indeed, in that case the Judicial Committee refused to accept the argument that where there is an absolute prohibition, no question of *mens rea* arises. The Privy Council again in *Lim Chim Aik v. The Queen*¹, reviewed the entire law on the question in an illuminating judgment and approached the question, if I may say so, from a correct perspective. By section 6 of the Immigration Ordinance, 1952, of the State of Singapore,

"It shall not be lawful for any person other than a citizen of Singapore to enter the Colony from the Federation or having entered the Colony from the Federation to remain in the Colony if such person has been prohibited by order made under section 9 of this Ordinance from entering the Colony"

and section 9, in the case of an order directed to a single individual, contained no provision for publishing the order or for otherwise bringing it to the attention of the person named. The Minister made an order prohibiting the appellant from entering the colony and forward it to the Immigration Officer. There was no evidence that the order had in fact come to the notice or attention of the appellant. He was prosecuted for contravening section 6 (2) of the Ordinance. Lord Evershed, speaking for the Board, reaffirmed the formulations cited from the judgment of Wright, J., and accepted by Lord de Parcq in *Srinivas Mull Bairoliya's case*². On a review of the case-law on the subject and the principles enunciated therein, the Judicial Committee came to the following conclusion :

"But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the Legislature imposed strict liability merely in order to find a luckless victim."

The same idea was repeated thus :

"Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended."

Dealing with the facts of the case before it, the Privy Council proceeded to illustrate the principle thus :

"But Mr. Le Quesne was unable to point to anything that the appellant could possibly have done so as to ensure that he complied with the regulations. It was not, for example, suggested that it would be practicable for him to make continuous inquiry to see whether an order had been made against him. Clearly one of the objects of the Ordinance is the expulsion of prohibited persons from Singapore, but there is nothing that a man can do about it, before the commission of the offence, there is no practical or sensible way in which he can ascertain whether he is a prohibited person or not."

On that reasoning the Judicial Committee held that the accused was not guilty of the offence with which he was charged. This decision adds a new dimension to the rule of construction of a statute in the context of *mens rea* accepted by earlier decisions. While it accepts the rule that for the purpose of ascertaining whether a statute excludes *mens rea* or not, the object of the statute and its wording must be weighed, it lays down that *mens rea* cannot be excluded unless the person or persons aimed at by the prohibition are in a position to observe the law or to promote the observance of the law. We shall revert to this decision at a later stage in a different context. This Court in *Ravula Haripradasa Rao v. The State*³, speaking through Fazl Ali, J., accepted the observations made by the Lord Chief Justice of England in *Brind v. Wood*⁴. The decision of this Court in *The Indo-China Steam Navigation Co.*

1. L.R. (1963) A.C. 160, 174, 175.

2. (1947) 1 L.R. 26 Pat. 460, 469 (P.C.)
(1947) 2 M.L.J. 328.

3. (1951) S.C.J. 296. (1951) 1 M.L.J. 612
(1951) S.C.R. 322.

4. (1946) 62 The Times L.R. 462, 463.

*Ltd. v. Jasjit Singh, Additional Collector of Customs, Calcutta*¹, is strongly relied upon by the appellant in support of the contention that *mens rea* is out of place in construing statutes similar to that under inquiry now. There, this Court was concerned with the interpretation of section 52-A of the Sea Customs Act, 1878. The Indo-China Steam Navigation Co., Ltd., which carries on the business of carriage of goods and passengers by sea, owns a fleet of ships, and has been carrying on its business for over 80 years. One of the routes plied by its ships is the Calcutta-Japan-Calcutta route. The vessel "Eastern Saga" arrived at Calcutta on 29th October, 1957. On a search it was found that a hole was covered with a piece of wood and over-painted and when the hole was opened a large quantity of gold in bars was discovered. After following the prescribed procedure the Customs authorities made an order confiscating the vessel in addition to imposing other penalties. One of the contentions raised was that section 52-A of the Sea Customs Act the infringement whereof was the occasion for the confiscation could not be invoked unless *mens rea* was established. Under that section no vessel constructed, adapted, altered or fitted for the purpose of concealing goods shall enter, or be within, the limits of any port in India, or the Indian Customs waters. This Court in construing the scheme and object of the Sea Customs Act came to the conclusion that *mens rea* was not a necessary ingredient of the offence, as, if that was so, the statute would become a dead-letter. That decision was given on the basis of the clear object of the statute and on a construction of the provisions of that statute which implemented the said object. It did not help us in construing the relevant provisions of the Foreign Exchange Regulation Act.

The Indian decisions also pursued the same line. A Division Bench of the Bombay High Court in *Emperor v. Isak Solomon Macmull*², in the context of the Motor Spirit Rationing Order, 1941, made under the Essential Supplies (Temporary Powers) Act, 1946, held that a master is not vicariously liable, in absence of *mens rea*, for an offence committed by his servant for selling petrol in absence of requisite coupons and at a rate in excess of the controlled rate. Chagla, C.J., speaking for the Division Bench, after considering the relevant English and Indian decisions observed :

"It is not suggested that even in the class of cases where the offence is not a minor offence or not quasi-criminal that the Legislature cannot introduce the principle of vicarious liability and make the master liable for the acts of his servant although the master has no *mens rea* and was morally innocent. But the Courts must be reluctant to come to such a conclusion unless the clear words of the statute compel them to do so or they are driven to that conclusion by necessary implication."

Too, a Division Bench of the Mysore High Court in *The State of Coorg v. P. K. Assu*³ held that a driver and a cleaner of a lorry which carried bags of charcoal and also contained bags of paddy and rice underneath without permit as required by a notification issued under the Essential Supplies (Temporary Powers) Act, 1946, were not guilty of any offence in the absence of their knowledge that the lorry contained food-stuffs. To the same effect a Division Bench of the Allahabad High Court in *State v. Heo Prasad*⁴, held that a master was not liable for his servant's act in carrying oilseeds in contravention of the order made under the Essential Supplies (Temporary Powers) Act, 1946, on the ground that he had not the guilty mind. In the same manner a Division Bench of the Calcutta High Court in *C. T. Prim v. The State*⁵, accepted the settled law that unless a statute clearly or by necessary implication rules out *mens rea* as a constituent part of the crime, no one should be found guilty of an offence under the criminal law unless he has got a guilty mind.

The law on the subject relevant to the present enquiry may briefly be stated as follows: It is a well-settled principle of common law that *mens rea* is an essential ingredient of a criminal offence. Doubtless a statute can exclude that element, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication

1. A.I.R. 1964 S.C. 1140.

2. (1948) 50 Bom L.R. 190, 194.

3. I.L.R. 1955 Mys. 516.

4. A.I.R. 1956 All. 610.

5. A.I.R. 1961 Cal 177.

excluded *mens rea*. To put it difficultly, there is a presumption that *mens rea* is an essential ingredient of a statutory offence ; but this may be rebutted by the express words of a statute creating the offence or by necessary implication. But the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability helps him to assist the State in the enforcement of the law : can he do anything to promote the observance of the law ? A person who does not know that gold cannot be brought into India without a licence or is not bringing into India any gold at all cannot possibly do anything to promote the observance of the law. *Mens rea* by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of *mens rea* that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.

What is the object of the Act ? The object of the Act and the notification issued thereunder is to prevent smuggling of gold and to conserve foreign exchange. Doubtless it is a laudable object. The Act and the notification were conceived and enacted in public interest ; but that in itself is not, as I have indicated, decisive of the legislative intention.

The terms of the section and those of the relevant notification issued thereunder do not expressly exclude *mens rea*. Can we say that *mens rea* is excluded by necessary implication ? Section 8 does not contain an absolute prohibition against bringing or sending into India any gold. It in effect confers a power on the Reserve Bank of India to regulate the import by giving general or special permission ; nor the notification dated 25th August, 1948, issued by the Government embodies any such absolute prohibition. It again, in substance, leaves the regulation of import of gold to the Reserve Bank of India ; in its turn the Reserve Bank of India by a notification of the same date permitted persons to transit gold to a place which is outside the territory of India and the Portuguese territories without any permission. Even the impugned notification does not impose an absolute prohibition against bringing into India gold which is on through transit to a place outside India. It permits such import for such through transit, but only subject to conditions. It is, therefore, manifest that the law of India as embodied in the Act under section 8 and in the notification issued thereunder does not impose an absolute prohibition against bringing into India gold which is on through transit to a place outside India ; and indeed it permits such bringing of gold but subject to certain conditions. The Legislature, therefore, did not think that public interest would irreparably suffer if such transit was permitted, but it was satisfied that with some regulation such interest could be protected. The law does not become nugatory if element of *mens rea* was read into it, for there would still be persons who would be bringing into India gold with the knowledge that they would be breaking the law. In such circumstances no question of exclusion of *mens rea* by necessary implication can arise.

If a person was held to have committed an offence in breach of the provision of section 8 of the Act and the notification issued thereunder without any knowledge on his part that there was any such notification or that he was bringing any gold at all, many innocent persons would become victims of law. An aeroplane in which a person with gold on his body is travelling may have a force landing in India, or an enemy of a passenger may surreptitiously and maliciously put some gold trinket in his pocket without his knowledge so as to bring him into trouble ; a person may be carrying gold without knowledge or even without the possibility of knowing that a law prohibiting taking of gold through India is in existence. All of them, if the interpretation suggested by the learned Solicitor-General be accepted, will have to be convicted and they might be put in jail for a period extending to 2 years. Such an interpretation is neither supported by the provisions of the Act nor is necessary to implement its object. That apart, by imposing such a strict liability as to catch innocent persons in the net of crime, the Act and the notifications issued thereunder

cannot conceivably enable such a class of persons to assist the implementation of the law : they will be helpless victims of law. Having regard to the object of the Act, I think no person shall be held to be guilty of contravening the provisions of section 8 of the Act, read with the notification dated 8th November, 1962, issued thereunder, unless he has knowingly brought into India gold without complying with the terms of the proviso to the notification.

Even so it is contended that the notification dated 8th November, 1962, is law and that the maxim "ignorance of law is no defence" applies to the breach of the said law. To state it differently, the argument is that even the mental condition of knowledge on the part of a person is imported into the notification ; the said knowledge is imputed to him by the force of the said maxim. Assuming that the notification dated 8th November, 1962, is a delegated legislation, I find it difficult to invoke that maxim as the statute empowering the Reserve Bank of India to give the permission, or the Rules made thereunder do not prescribe the mode of publication of the notification. Indeed a similar question arose before the Privy Council in *Lim Chin Aik v. The Queen*¹, and a similar argument was advanced before it ; but the Board rejected it. I have already dealt with this decision in another context. There the Minister under the powers conferred on him by section 9 of the Immigration Ordinance, 1952, issued an order prohibiting the appellant therein from entering Singapore. He was prosecuted for disobeying that order. Section 9, in the case of an order directed to a single individual, contained no provision for publishing the order or for otherwise bringing it to knowledge of the person named. The Crown invoked the precept that ignorance of the law was no excuse. In rejecting the contention of the Crown, Lord Evershed, speaking for the Board, observed at page 171 thus :

"Their Lordships are unable to accept the contention. In their Lordship's opinion, even if the making of the order by the Minister be regarded as an exercise of the legislative as distinct from the executive or administrative function (as they do not concede), the maxim cannot apply to such a case as the present where it appears that there is in the State of Singapore no provision, corresponding, for example, to that contained in section 3 (2) of the English Statutory Instruments Act of 1946, for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate inquiry to find out what "the law" is".

Here, as there, it is conceded that there is no provision providing for the publication in any form of an order of the kind made by the Reserve Bank of India imposing conditions on the bringing of gold into India. The fact that the Reserve Bank of India published the order in the Official Gazette does not affect the question for it need not have done so under any express provisions of any statute or Rules made thereunder. In such cases the maxim cannot be invoked and the prosecution has to bring home to the accused that he had knowledge or could have had knowledge if he was not negligent or had made proper enquiries before he could be found guilty of infringing the law. In this case the said notification was published on 24th November, 1962, and the accused left Zurich on 27th November, 1962, and it was not seriously contended that the accused had or could have had with diligence the knowledge of the contents of the said notification before he brought gold into India. I, therefore, hold that the respondent was not guilty of the offence under section 23 (1-A) of the Act as it has not been established that he had with knowledge of the contents of the said notification brought gold into India on his way to Manila and, therefore, he had not committed any offence under the said section. I agree with the High Court in its conclusion though for different reasons.

Though the facts established in the case stamp the respondent as an experienced smuggler of gold and though I am satisfied that the Customs Authorities *bona fide* and with diligence performed their difficult duties, I have reluctantly come to the conclusion that the accused has not committed any offence under section 23 (1-A) of the Act.

In the result, the appeal fails and is dismissed.

Rajagopala Ayyangar (for himself and *Mudholkar*).—This appeal by Special Leave is directed against the judgment and order of the High Court of Bombay setting aside the conviction of the respondent under section 8 (1) of the Foreign Exchange Regulation Act (VII of 1947), 1947, hereinafter called the "Act", read with a notification of the Reserve Bank of India dated 8th November, 1962, and directing his acquittal. The appeal was heard by us at the end of April last and on the 8th May which was the last working day of the Court before it adjourned for the summer vacation, the Court pronounced the following order :

"By majority, the appeal is allowed and the conviction of the respondent is restored ; but the sentence imposed on him is reduced to the period already undergone. The respondent shall forthwith be released and the bail bond, if any, cancelled. Reasons will be given in due course."

We now proceed to state our reasons. The material facts of the case are not in controversy. The respondent who is a German national by birth is stated to be a sailor by profession. In the statement that he made to the Customs Authorities, when he was apprehended the respondent stated that some person not named by him met him in Hamburg and engaged him on certain terms of remuneration, to clandestinely transport gold from Geneva to places in the Far East. His first assignment was stated by him to be to fly to Tokyo wearing a jacket which concealed in its specially designed pockets 34 bars of gold each weighing a kilo. He claimed he had accomplished this assignment and that he handed over the gold he carried to the person who contacted him at Tokyo. From there he returned to Geneva where he was paid his agreed remuneration. He made other trips, subsequently being engaged in like adventures in all of which he stated he had succeeded, each time carrying 34 kilos of gold bars which on every occasion was carried concealed in a jacket which he wore, but we are now concerned with the one which he undertook at the instance of this international gang of gold smugglers carrying, similarly, 34 kilo bars of gold concealed in a jacket which he wore, on his person. This trip started at Zurich on 27th November, 1962, and according to the respondent his destination was Manila where he was to deliver the gold to a contact there. The plane arrived in Bombay on the morning of the 28th. The Customs Authorities who had evidently advance information of gold being attempted to be smuggled by the respondent travelling by that plane, first examined the manifest of the aircraft to see if any gold had been consigned by any passenger. Not finding any entry there, after ascertaining that the respondent had not come out of the plane as usual to the airport lounge, entered the plane and found him there seated. They then asked him if he had any gold with him. The answer of the respondent was "what gold" with a shrug indicating that he did not have any. The Customs Inspector thereupon felt the respondent's back and shoulders and found that he had some metal blocks on his person. He was then asked to come out of the plane and his baggage and person were searched. On removing the jacket he wore it was found to have 28 specially made compartments 9 of which were empty and from the remaining 19, 34 bars of gold each weighing approximately one kilo were recovered. The respondent, when questioned, disclaimed ownership of the gold and stated that he had no interest in these goods and gave the story of his several trips which we have narrated earlier. It was common ground that the gold which the respondent carried was not entered in the manifest of the aircraft or other documents carried by it.

The respondent was thereafter prosecuted and charged with having committed an offence under section 8 (1) of the Act and also of certain provisions of the Sea Customs Act, in the Court of the Presidency Magistrate, Bombay. The Presidency Magistrate, Bombay took the complaint on file. The facts stated earlier were not in dispute but the point raised by the respondent before the Magistrate was one of law based on his having been ignorant of the law prohibiting the carrying of the gold in the manner that he did. In other words, the plea was that *mens rea* was an ingredient of the offence with which he was charged and as it was not disputed by the prosecution that he was not actually aware of the notification of the Reserve Bank of India which rendered the carriage of gold in the manner that he did an

offence, he could not be held guilty. The learned Magistrate rejected this defence and convicted the respondent and sentenced him to imprisonment for one year. On appeal by the respondent the learned Judges of the High Court have allowed the appeal and acquitted the respondent upholding the legal defence which he raised. It is the correctness of this conclusion that calls for consideration in this appeal.

Before considering the arguments advanced by either side before us it would be necessary to set out the legal provisions on the basis of which this appeal has to be decided. The Foreign Exchange Regulation Act, 1947 was enacted in order to conserve foreign exchange, the conservation of which is of the utmost essentiality for the economic survival and advance of every country, and very much more so in the case of a developing country like India. Section 8 of the Act enacts the restrictions on the import and export *inter alia* of bullion. This section enacts, to read only that portion which relates to the import with which this appeal is concerned :

"8 (1) The Central Government may, by notification in the Official Gazette, order that, subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any prescribed, bring or send into India any gold or silver or any currency notes or bank notes or coin whether Indian or Foreign.

Explanation.—The bringing or sending into any port or place in India, of any such article as aforesaid intended to be taken out of India without being removed from the ship or conveyance in which it is being carried shall nonetheless be deemed to be a bringing or as the case may be, sending into India of that article for the purposes of this section."

Section 8 has to be read in conjunction with section 23 which imposes penalties on persons contravening the provisions of the Act. Sub-section (1) penalises the contravention of the provisions of certain named sections of the Act which do not include section 8, and this is followed by sub-section (1-A) which is residuary and is directly relevant in the present context and it reads :

"23. (1-A) whoever contravenes—

(a) any of the provisions of this Act or of any rule, direction or order made thereunder, other than those referred to in sub-section (1) of this section and section 19 shall, upon conviction by a Court be punishable with imprisonment for a term which may extend to two years, or with fine, or with both ;

(b) any direction or order made under section 19 shall, upon conviction by a Court be punishable with fine which may extend to two thousand rupees "

These have to be read in conjunction with the rule as to onus of proof laid down in section 24 (1) which enacts :

"24. (1) Where any person is prosecuted or proceeded against for contravening any provisions of this Act or of any rule, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him."

Very soon after the enactment of the Act the Central Government took action under section 8 (1) and by a notification published in the Official Gazette dated 25th August, 1948, the Central Government directed that "except with the general or special permission of the Reserve Bank no person shall bring or send into India from any place out of India any "gold bullion," to refer only to the item relevant in the present context. The Reserve Bank by a notification of even date (25th August, 1948) granted a general permission in these terms:

"The Reserve Bank of India is hereby pleased to give general permission to the bringing or sending of any gold or any such silver by sea or air into any port in India ;

Provided that the gold or silver

(a) is on through transit to a place which is outside both

(i) the territory of India,

and (ii) the Portuguese territories which are adjacent to or surrounded by the territory of India.

(b) is not removed from the carrying ship or aircraft except for the purpose of transhipment."

On 8th November, 1962, however, the Reserve Bank of India in supersession of the notification just now read, published a notification (and this is the one which was in force at the date relevant to this case) giving general permission to the bringing or sending of gold, gold-coin etc.

“into any port or place in India when such articles is on through transit to a place which is outside the territory of India :

Provided that such articles is not removed from the ship or conveyance in which it is being carried except for the purpose of transhipment :

Provided further that it is declared in the manifest for transit as bottom cargo or transhipment cargo.”

This notification was published in the Gazette of India on 24th November, 1962.

It was not disputed by Mr. Sorabjee—learned Counsel for the respondent, subject to an argument based on the construction of the newly added 2nd proviso to which we shall refer later, that if the second notification of the Reserve Bank restricting the range of the exemption applied to the respondent, he was clearly guilty of an offence under section 8 (1) of the Act read with the *Explanation* to the sub-section. On the other hand, it was not also disputed by the learned Solicitor-General for the appellant-State that if the exemption notification which applied to the present case was that contained in the notification of the Reserve Bank dated 25th August, 1948, the respondent had not committed any offence since (a) he was a through passenger from Geneva to Manila as shown by the ticket which he had and the manifest of the aircraft, and besides, (b) he had not even got down from the plane.

Two principal questions have been raised by Mr. Sorabjee in support of the proposition that the notification dated 8th November, 1962, restricting the scope of the permission or exemption granted by the Reserve Bank did not apply to the case. The first was that *mens rea* was an essential ingredient of an offence under section 23 (1-A) of the Act and that the prosecution had not established that the respondent knowingly contravened the law in relation to the carriage of the contraband article; (2) The second head of learned Counsel's argument was that the notification dated 8th November, 1962, being merely subordinate or delegated legislation, could be deemed to be in force not from the date of its issue or publication in the Gazette but only when it was brought to the notice of persons who would be affected by it and that as the same was published in the Gazette of India only on 24th November, 1962, whereas the respondent left Zurich on the 27th November, he could not possibly have had any knowledge thereof the new restrictions imposed by the Indian authorities and that, in these circumstances, the respondent could not be held guilty of an offence under section 8 (1) or section 23 (1-A) of the Act. He also raised a subsidiary point that the notification of the Reserve Bank could not be attracted to the present case because the second proviso which made provision for a declaration in the manifest “for transit as bottom cargo or transhipment cargo” could only apply to gold handed over to the aircraft for being carried as cargo and was inapplicable to cases where the gold was carried on the person of a passenger.

We shall deal with these points in that order. First as to whether *mens rea* is an essential ingredient in respect of an offence under section 23 (1-A) of the Act. The argument under this head was broadly as follows : it is a principle of the Common Law that *mens rea* is an essential element in the commission of any criminal offence against the Common Law. This presumption that *mens rea* is an essential ingredient of an offence equally applies to an offence created by statute though the presumption is liable to be displaced by the words of the statute creating the offence, or by the subject-matter dealt with by it (Wright, J. in *Sherras v De Rutzen*)¹. But unless the statute clearly or by fair implication rules out *mens rea*, a man should not be convicted unless he has a guilty mind. In other words,

1. L.R. (1895) 1 Q.B. 918.

absolute liability is not to be presumed, but ought to be established. For the purpose of finding out if the presumption is displaced, reference has to be made to the language of the enactment, the object and subject-matter of the statute and the nature and character of the act sought to be punished. In this connection learned Counsel for the respondent strongly relied on a decision of the Judicial Committee in *Srinivas Mall Bairoliya v. King Emperor*¹. The Board was, there, dealing with the correctness of a conviction under the Defence of India Rules, 1939 relating to the control of prices. The appellant before the Board was a dealer in wholesale who had employed a servant to whom he had entrusted the duty of allotting salt to retail dealers and noting on the buyer's licence the quantity which the latter had bought and received all of which were required to be done under the Rules. For the contravention by the servant of the Regulations for the sale of salt prescribed by the Defence of India Rules the appellant was prosecuted and convicted as being vicariously liable for the act of his servant in having made illegal exactions contrary to the Rules. The High Court took the view that even if the appellant had not been proved to have known the unlawful acts of his servant, he would still be liable on the ground that "where there is an absolute prohibition and no question of *mens rea* arises, the master is criminally liable for the acts of his servant". On appeal to the Privy Council Lord Du Parcq who delivered the judgment of the Board dissented from this view of the High Court and stated :

"They see no ground for saying that offences against those of the Defence of India Rules here in question are within the limited and exceptional class of offences which can be held to be committed without a guilty mind. See the judgment of Wright, J. in *Srinivas v. De Rutter*². Offences which are within the class are usually of a comparatively minor character, and it would be a surprising result of this delegated legislation if a person who was morally innocent of blame could be held vicariously liable for a servant's crime and so punishable with imprisonment for a term which may extend to three years."

The learned Lord then quoted with approval the view expressed by the Lord Chief Justice in *Brend v. Wood*³:

"It is..... of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that, unless the statute, either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind."

Mr. Sorabjee is justified in referring us to these rules regarding presumption and construction and it may be pointed out that this Court has, in *Ravula Hariprasad Rao v. The State*⁴ approved of this passage in the judgment of Lord Du Parcq and the principle of construction underlying it. We therefore agree that absolute liability is not to be lightly presumed but has to be clearly established. Besides, learned Counsel for the respondent strongly urged that on this point the exposition by Lord Evershed in *Lim Chin Ali v. The Queen*⁵, had clarified the principles applicable in this branch of the law, and that in the light of the criteria there laid down we should hold that on a proper construction of the relevant provisions of the Act, *mens rea* or a guilty mind must be held to be an essential ingredient of the offence and that as it was conceded by the prosecution in the present case that the respondent was not aware of the notification by the Reserve Bank of India dated the 8th November, he could not be held guilty of the offence. We might incidentally state that that decision was also relied on in connection with the second of the submissions made to us as regards the time when delegated legislation could be deemed to come into operation, but to that aspect we shall advert later.

In order to appreciate the scope and effect of the decision and of the observations and reasoning to which we shall presently advert it is necessary to explain in some detail the facts involved in it. Section 6 (2) of the Immigration Ordinance, 1952, of the State of Singapore enacted :

"6. (2) It shall not be lawful for any person other than a citizen of Singapore to enter the Colony from the Federation if such person has been prohibited by order made under section 9 of this Ordinance from entering the Colony."

1. (1947) 2 M.L.J. 323 (P.C.) I.L.R. 26 Pat. 460.

2. L.R. (1895) 1 Q.B. 918, 921.

3. (1946) 110 J.P. 317.

4. (1951) S.G.J. 296 : (1951) 1 M.L.J. 612 : (1951) S.C.R. 322 at p. 328 : A.I.R. 1951 S.C. 204.

5. L.R. 1963 A.C. 160.

By sub-section (3) it was provided that :

"Any person who contravenes the provisions of sub-section (2) of this section shall be guilty of an offence against this ordinance."

Section 9 which is referred to in section 6 (2) to quote the material words of sub-section (1) read :

"The Minister may by order (1) prohibit either for a stated period or permanently the entry or re-entry into the Colony of any person or class of persons "

Its sub-section (3) provided :

"Every order made under sub-s. (1) of this section shall unless it be otherwise provided in such order take effect and come into operation on the date on which it was made."

While provision was made by the succeeding portion of the sub-section for the publication in the Gazette of orders which related to a class of persons, there was no provision in the sub-section for the publication of an order in relation to named individuals or otherwise for bringing it to the attention of such persons. The appellant before the Privy Council had been charged with and convicted by the Courts in Singapore of contravening section 6 (2) of the Ordinance by remaining in Singapore when by an order made by the Minister under section 9 (1) he had been, by name, prohibited from entering the island. At the trial there was no evidence from which it could be inferred that the order had in fact come to the notice or attention of the accused. On the other hand, the facts disclosed that he could not have known of the order. On appeal by the accused, the conviction was set aside by the Privy Council. The judgment of the Judicial Committee in so far as it was in favour of the appellant, was based on two lines of reasoning. The first was that in order to constitute a contravention of section 6 (2) of the Ordinance *mens rea* was essential. The second was that even if the order of the Minister under section 9 were regarded as an exercise of legislative power, the maxim "ignorance of law is no excuse" could not apply because there was not, in Singapore, any provision for the publication, in any form, of an order of the kind made in the case or any other provision to enable a man, by appropriate enquiry, to find out what the law was.

Lord Evershed who delivered the judgment of the Board referred with approval to the formulation of the principle as regards *mens rea* to be found in the judgment of Wright, J., in *Sherras v. De Rutzen*,¹ already referred to. His Lordship also accepted as correct the enunciation of the rule in *Srinivas Mall Barohiya v. King Emperor*² in the passage we have extracted earlier. Referring next to the argument that where the statute was one for the regulation for the public welfare of a particular activity it had frequently been inferred that strict liability was the object sought to be enforced by the Legislature, it was pointed out :

"The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of *mens rea*."

Reference was then made to legislation regulating sale of food and drink and he then proceeded to state :

"It is not enough merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the Legislature imposed strict liability merely in order to find a luckless victim."

As learned Counsel has laid great stress on the above passages, it is necessary to analyse in some detail the provisions in the Singapore Ordinance in relation to which this approach was made and compare them with the case on hand. Let us first consider the frame of section 6 (2) of the Singapore Ordinance the relevant portion of which we have set out earlier. It prohibits the entry of non-citizens into the Colony from the Federation, only in the event of that entry being banned

1. L.R. (1895) 1 Q.B. 918, 921.

2. (1947) 2 M.L.J. 328; I.L.R. 26 Pat. 460 (P.C.).

by a general or particular order made by the Minister under section 9. In other words, in the absence of an order made under section 9, there was freedom of entry or rather absence of any legal prohibition against entry of persons from the Federation. In the light of this situation, the construction adopted was that persons who normally could lawfully enter the colony, had to be proved to have a guilty mind, *i.e.*, actual or constructive knowledge of the existence of the prohibition against their entry before they could be held to have violated the terms of section 6 (2). It is in this context that the reference to "the luckless victim" has to be understood. The position under sections 8 and 23 of the Act is, if we may say so, just the reverse. Apart from the public policy and other matters underlying the legislation before us to which we shall advert later, section 8 (1) of the Act empowers the Central Government to impose a complete ban on the bringing of any gold into India, the act of "bringing" being understood in the sense indicated in the *Explanation*. When such a ban is imposed, the import or the bringing of gold into India could be effected only subject to the general or special permission of the Reserve Bank. Added to this, and this is of some significance, there is the provision in section 24 (1) of the Act which throws on the accused in a prosecution the burden of proving that he had the requisite permission, emphasising as it were that in the absence of a factual and existent permission to which he can refer, his act would be a violation of the law. In pursuance of the provision in section 8 (1), the Central Government published a notification on 25th August, 1948, in which the terms of section 8(1) regarding the necessity of permission of the Reserve Bank to bring gold into India were repeated. On the issue of this notification the position was that everyone who "brought" gold into India, in the sense of the *Explanation* to section 8 (1), was guilty of an offence, unless he was able to rely for his act on permission granted by the Reserve Bank. We therefore start with this : The bringing of gold into India is unlawful unless permitted by the Reserve Bank, —unlike as under the Singapore Ordinance, where an entry was not unlawful unless it was prohibited by an order made by the Minister. In the circumstances, therefore, *mens rea*, which was held to be an essential ingredient of the offence of a contravention of a Minister's order under the Ordinance, cannot obviously be deduced in the context of the reverse position obtaining under the Act.

There was one further circumstance to which it is necessary to advert to appreciate the setting in which the question arose before the Privy Council. The charge against the appellant was that having entered Singapore on or about 17th May, 1959, he remained there while prohibited by an order of the Minister under section 9 and thereby contravened section 6 (2) of the Immigration Ordinance. At the trial it was proved that the order of the Minister was made on 28th May, 1959, *i.e.*, over 10 days after the appellant had entered the Colony. It was proved that the Minister's order which prohibited the appellant, who was named in it, from entering Singapore was received by the Deputy Assistant Controller of Immigration on the day on which it was made and it was retained by that official with himself. The question of the materiality of the knowledge of the accused of the order prohibiting him from entering the Colony came up for consideration in such a context. The further question as to when the order would, in law, become effective, relates to the second of the submissions made to us by the respondent and will be considered later.

Reverting now to the question whether *mens rea*—in the sense of actual knowledge that the act done by the accused was contrary to the law—is requisite in respect of a contravention of section 8 (1), starting with an initial presumption in favour of the need for *mens rea*, we have to ascertain whether the presumption is overborne by the language of the enactment, read in the light of the objects and purposes of the Act, and particularly whether the enforcement of the law and the attainment of its purpose would not be rendered futile in the event of such an ingredient being considered necessary.

We shall therefore first address ourselves to the language of the relevant provisions. Section 23 (1-A) of the Act which has already been set out refers to contravention of the provisions of the Act or the Rule, etc., so

might be termed neutral in the present context, in that it neither refers to the state of the mind of the contravener by the use of the expression such as "wilfully, knowingly" etc., nor does it, in terms, create an absolute liability. Where the statute does not contain the word 'knowingly', the first thing to do is to examine the statute to see whether the ordinary presumption that *mens rea* is required applies or not. When one turns to the main provision whose contravention is the subject of the penalty imposed by section 23 (1-A), viz, section 8 (1) in the present context, one reaches the conclusion that there is no scope for the invocation of the rule of *mens rea*. It lays an absolute embargo upon persons who without the special or general permission of the Reserve Bank and after satisfying the conditions, if any prescribed by the Bank bring or send into India any gold, etc., the absoluteness being emphasised, as we have already pointed out, by the terms of section 24 (1) of the Act. No doubt, the very concept of "bringing" or "sending" would exclude an involuntary bringing or an involuntary sending. Thus, for instance, if without the knowledge of the person a packet of gold was slipped into his pocket it is possible to accept the contention that such a person did not "bring" the gold into India within the meaning of section 8 (1). Similar considerations would apply to a case where the aircraft on a through flight which did not include any landing in India has to make a force landing in India—owing say to engine trouble. But if the bringing into India was a conscious act and was done *with the intention of bringing it into India* the mere "bringing" constitutes the offence and there is no other ingredient that is necessary in order to constitute a contravention of section 8 (1) than that conscious physical act of bringing. If then under section 8 (1) the conscious physical act of "bringing" constitutes the offence, section 23 (1-A) does not import any further condition for the imposition of liability than what is provided for in section 8 (1). On the language, therefore, of section 8 (1) read with section 24 (1) we are clearly of the opinion that there is no scope for the invocation of the rule that besides the mere act of voluntarily bringing gold into India any further mental condition is postulated as necessary to constitute an offence of the contravention referred to in section 23 (1-A).

Next we have to have regard to the subject-matter of the legislation. For, as pointed out by Wills, J. in *R. v Tolson*¹:

"Although, *prima facie* and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong, or not."

The Act is designed to safeguarding and conserving foreign exchange which is essential to the economic life of a developing country. The provisions have therefore to be stringent and so framed as to prevent unauthorised and unregulated transactions which might upset the scheme underlying the controls; and in larger context, the penal provisions are aimed at eliminating smuggling which is a concomitant of controls over the free movement of goods or currencies. In this connection we consider it useful to refer to two decisions—the first decision of the Privy Council and the other of the Court of Criminal Appeal. The decision of the Privy Council is that reported as *Bruhn v The King*², where the plea of *mens rea* was raised as a defence to a prosecution for importation of opium in contravention of the Straits Settlements Opium Ordinance, 1906. Lord Atkinson speaking for the Board, referring to the plea as to *mens rea*, observed:

"The other point relied upon on behalf of the appellant was that there should be proof, express or implied, of a *mens rea* in the accused person before he could be convicted of a criminal offence. But that depends upon the terms of the statute or Ordinance creating the offence. In many cases connected with the revenue certain things are prohibited unless done by certain persons, or under certain conditions. Unless the person who does one of these things can establish that he is one of the privileged class, or that the prescribed conditions have been fulfilled, he will be adjudged guilty of the offence, though in fact he knew nothing of the prohibition."

The criteria for the construction of statutes of the type we have before us laid down by the Court of Criminal Appeal in *Regina v. St. Margarets Trust Ltd.*³, is perhaps even

1. L.R. 23 Q.B.D. 168.
2. L.R. 1909 A.C. 317.

3. (1958) 1 W.L.R. 522.

nearer to the point. The offence with which the appellants were there charged was a violation of the Hire Purchase and Credit Sale Agreements (Control) Order, 1956 which, having been enacted to effectuate a credit-squeeze, as being necessary for the maintenance of British-economy, required by the Rules made under it that every Hire Purchase agreement should state the price of the article and fixed the maximum proportion thereof which a hirer might be paid by a Financing Company. The appellant-company advanced to the hirer of a motor car more than the permissible percentage but did so as it was misled by the company which sold the motor car as regards the price it charged to the customer. The plea raised in defence was that the Finance Company were unaware of the true price and that not having guilty knowledge, they could not be convicted of the offence. Donovan, J., who spoke for the Court said :

"The language of Article 1 of the Order expressly prohibits what was done by St. Margarets Trust, Ltd., and if that company is to be held to have committed no offence some judicial modification of the actual terms of the article is essential. The appellants contend that the article should be construed so as not to apply where the prohibited act was done innocently. In other words, that *mens rea* should be regarded as essential to the commission of the offence. The appellants rely on the presumption that *mens rea* is essential for the commission of any statutory offence unless the language of the statute, expressly or by necessary implication negatives such presumption."

The learned Judge then referred to the various decisions in which the question as to when the Court would hold the liability to be absolute and proceeded :

"The words of the Order themselves are an express and unqualified prohibition of the acts done in this case by St. Margarets Trust, Ltd. The object of the Order was to help to defend the currency against the peril of inflation which, if unchecked, would bring disaster upon the country. There is no need to elaborate this. The present generation has witnessed the collapse of the currency in other countries and the consequent chaos, misery and widespread ruin. It would not be at all surprising if Parliament, determined to prevent similar calamities here, enacted measures which it intended to be absolute prohibition of acts which might increase the risk in however small a degree. Indeed, that would be the natural expectation. There would be little point in enacting that no one should breach the defences against a flood, and at the same time excusing anyone who did it innocently. For these reasons we think that Article 1 of the Order should receive a literal construction, and that the ruling of Diplock, J., was correct.

It is true that Parliament has prescribed imprisonment as one of the punishments that may be inflicted for a breach of the Order and this circumstance is urged in support of the appellant's, argument that Parliament intended to punish only the guilty. We think it is the better view that having regard to the gravity of the issues, Parliament intended the prohibition to be absolute, leaving the Court to use its powers to inflict nominal punishment or none at all in appropriate cases."

We consider these observations apposite to the construction of the provision of the Act now before us.

This question as to when the presumption as to the necessity for *mens rea* is overborne has received elaborate consideration at the hands of this Court when the question of the construction of section 52-A of the Sea Customs Act came up for consideration in *The Indo-China Steam Navigation Co., Ltd. v. Jasjit Singh, Additional Collector of Customs, Calcutta, etc.*¹. Speaking for the Court, Gajendragadkar, C.J., said:

"The intention of the Legislature in providing for the prohibition prescribed by section 52-A is *inter alia*, to put an end to illegal smuggling which has the effect of disturbing very rudely the national economy of the country. It is well-known, for example, that smuggling of gold has become a serious problem in this country and operations of smuggling are conducted by operators who work on an international basis. The persons who actually carry out the physical part of smuggling gold by one means or another are generally no more than agents and presumably, behind them stands a well-knit organisation which, for motives of profit making, undertakes this activity."

This passage, in our opinion, is very apt in the present context and the offences created by sections 3 and 23 (1-A) of the Act.

In our opinion, the very object and purpose of the Act and its effectiveness as an instrument for the prevention of smuggling would be entirely frustrated if a condition were to be read into section 3 (1) or section 23 (1-A) of the Act qualifying the plain words of the enactment, that the accused should be proved to have knowledge that he was contravening the law before he could be held to have contravened the provision.

Summarising the position, the result would be this. If the Central Government, by notification in the Official Gazette, imposed a ban on any person bringing gold into India any person who brought such gold in contravention of the notification would be guilty of an offence under this section. This brings us to the notification of the Central Government dated 25th August, 1948, whose terms we have set out. By reason of that notification the bringing of gold into India was made an offence. In this connection it is necessary to bear in mind the *Explanation* to section 8 (1) which we have already set out. By reason of that *Explanation* it would be seen that even if the gold continued to remain in a ship or aircraft which is within India without its being taken out and was not removed from the ship or aircraft it shall nevertheless be deemed to be a "bringing" for the purpose of the section. We are referring to this *Explanation* because if the act of the respondent was an offence under the section—section 8 (1)—he gets no advantage by his having remained on the aircraft without disembarking at Bombay, for if the carrying on his person of the gold was "the bringing" of the gold into India, the fact that he did not remove himself from the aircraft but stayed on in it would make no difference and he would nevertheless be guilty of the offence by reason of the *Explanation* to section 8 (1). We would only add that learned Counsel for the respondent did not dispute this. The position, therefore, was that immediately the Central Government published the notification on 25th August, 1948, the bringing of gold into India in the sense covered by the *Explanation* would have brought it within section 8 (1) of the Act. So much is common ground. But by reason of a notification by the Reserve Bank of even date gold in through-transit from places outside India to places similarly situated which were not removed from the aircraft except for the purpose of transshipment was exempted from the operation of the notification of the Central Government issued under section 8 (1). If this notification had continued in force and had governed the right of persons to transport gold through India the respondent could not be guilty of a contravention of section 8 (1). The respondent would then have had the permission which saved his act of "bringing" from being an offence. However, as stated earlier, on 8th November, 1962, the Reserve Bank of India modified the earlier notification and added an additional condition for exemption, *viz.* that the gold must be declared in the manifest of the aircraft as 'same bottom cargo' or transshipment cargo. Therefore when the respondent was in Bombay with the gold, he had not the requisite permission of the Reserve Bank and so he contravened the prohibition under section 8 (1).

The next submission of Mr. Sorabjee was ~~that~~ Even assuming that *mens rea*, which in the present context was equated with knowledge of the existence and contents of the notification of the Reserve Bank dated 8th November, 1962, was not necessary to be established to prove a contravention of section 8 (1) (a) of the Act, the notification of the Reserve Bank dated 8th November, 1962, could not be deemed to have been in force and operation on 28th November, 1962, when the respondent was alleged to have committed the offence of "bringing" gold into India. Accepting the general rule that ignorance of law is no excuse for its contravention and the maxim that every one is presumed to know the law, learned Counsel submitted an elaborate argument as regards the precise point of time when a piece of delegated legislation like the exemption notification by the Reserve Bank would in law take effect. There is no provision in the General Clauses Act as regards the time when subordinate legislation enacted under powers conferred by Acts of the Central Legislature shall come into effect. There is no provision either in the particular Act with which we are concerned determining the point of time at which orders made, or permission granted by virtue of powers conferred by the parent statute would come into operation. In the absence of a statutory provision such as is found in section 5 (1) of the General Clauses Act, learned Counsel submitted that such orders or notifications could have effect only from the date on which the person against whom it is sought to be enforced had knowledge of their making. In support of this position he relied strongly on the decision of the Privy Council already referred to—*Lim Chin Aik v. The Queen*¹.

We have dealt with that decision in regard to the point about *mens rea*, and have also pointed out that one of the grounds on which the appeal was allowed was that there had been no publication of the order of the Minister, banning the entry of the appellant, so as to render the appellant's act a contravention of section 6 (2) of the Singapore Ordinance. We have adverted to the circumstance that the order of the Minister there in question was communicated only to the officer in the Immigration department from whose custody it was produced at the trial. In that situation Lord Evershed observed :

" It was said on the respondent's part that the order made by the Minister under the powers conferred by section 9 of the Ordinance was an instance of the exercise of delegated legislation and therefore that the order, once made, became part of the law of Singapore of which ignorance could provide an excuse upon a charge of contravention of the section. Their Lordships are unable to accept this contention. In their Lordships' opinion, even if the making of the order by the Minister be regarded as an exercise of the legislative as distinct from the executive or administrative function (as they do not concede), the maxim cannot apply to such a case as the present where it appears that there is in the State of Singapore no provision, corresponding, for example, to that contained in section 3 (2) of the English Statutory Instruments Act of 1946, for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate inquiry to find out what 'the law' is. In this connection it is to be observed that a distinction is drawn in the Ordinance itself between an order directed to a particular individual on the one hand and an order directed to a class of persons on the other, for sub-section 3 (b) of section 9 provides in the latter case both for publication in the Gazette and presentation to the Legislation Assembly."

Based on this passage, it was urged that the notification of the Reserve Bank dated 8th November, 1962, could not be deemed to be in force, at least not on 28th November, 1962, when the respondent landed in Bombay and that consequently he could not be held guilty of the contravention of section 8 (1). This argument cannot, in our opinion, be accepted. In the first place, the order of the Minister dealt with by the Privy Council was never "published" since admittedly it was transmitted only to the Immigration official who kept it with himself. But in the case on hand, the notification by the Reserve Bank varying the scope of the exemption, was admittedly "published" in the Official Gazette—the usual mode of publication in India, and it was so published long before the respondent landed in Bombay. The question, therefore, is not whether it was published or not, for in truth it was published, but whether it is necessary that the publication should be proved to have been brought to the knowledge of the accused. In the second place, it was the contravention of the order of the Minister that was made criminal by section 6 (2) of the Immigration Ordinance. That is not the position here, because the contravention contemplated by section 23 (1-A) of the Act is, in the present context, of an order of the Central Government issued under section 8 (1) of the Act and published in the Official Gazette on 25th November, 1948, and this order was in force during all this period. No doubt, for the period up to the 8th November, the bringing of gold by through passengers would not be a contravention because of the permission of the Reserve Bank exempting such bringing from the operation of the Central Government's notification. It was really the withdrawal of this exemption by the Reserve Bank that rendered the act of the respondent criminal. It might well be that there is a distinction between the withdrawal of an exemption which saves an act otherwise criminal from being one and the passing of an order whose contravention constitutes the crime. Lastly, the order made by the Minister in the Singapore case, was one with respect to a single individual, not a general order, whereas what we have before us is a general rule applicable to every person who passes through India. In the first case, it would be reasonable to expect that the proper method of acquainting a person with an order which he is directed to obey is to serve it on him, or so publish it that he would certainly know of it, but there would be no question of individual service of a general notification on every member of the public, and all that the subordinate law-making body can or need do, would be to publish it in such a manner that persons can, if they are interested, acquaint themselves with its contents. In this connection reference may be made to Rule 141 of the Defence of India Rules, 1962 which runs :

" 141. *Publication, affixation and defacement of notices*—(1) Save as otherwise expressly provided in these Rules, every authority, officer or person who makes any order in writing in pursuance of any of these Rules shall, in the case of an order of a general nature or affecting a class of persons publish

notice of such order in such manner as may, in the opinion of such authority, officer or person be best adapted for informing persons whom the order concerns in the case of an order affecting an individual corporation or firm serve or cause the order to be served in the manner for the service of a summons in rule 2 of Order 29 or rule 3 of Order 30, as the case may be, in the First Schedule to the Code of Civil Procedure, 1908 (V of 1908) and in the case of an order affecting an individual person (not being a corporation or firm) serve or cause the order to be served on that person—

(i) personally, by delivering or tendering to him the order, or

(ii) by post, or

(iii) where the person cannot be found, by leaving, an authentic copy of the order with some adult male member of his family or by affixing such copy to some conspicuous part of the premises in which he is known to have last resided or carried on business or personally worked for gain and thereupon the persons, corporation, firm or person concerned shall be deemed to have been duly informed of the order "

and this which is substantially the same as Rule 119 of the Defence of India Rules, 1939 brings out clearly the distinction between orders which are intended to apply to named individuals and orders of a general nature.

Reliance was also placed by Mr. Sorabjee on the judgment of Bailhache, J. in *Johnson v Sargent & Sons*¹, where speaking of an order of the Food Controller dated 16th May, said to have been contravened on the same day, the learned Judge said :—

" I have no reason to suppose that any one in the trade knew about it on May 16 While I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, there is about statutes a publicity even before they come into operation which is absent in the case of many orders such as that with which we are now dealing, indeed, if certain orders are to be effective at all, it is essential that they should not be known until they are actually published. In the absence of authority upon the point I am unable to hold that this order came into operation before it was known, and, as I have said, it was not known until the morning of May, 17 "

Referring to this case Prof. C. K. Allen says²:

" On the face of it, it would seem reasonable that legislation of any kind should not be binding until it has somehow been 'made known' to the public, but that is not the rule of law, and if it were the automatic cogency of a statute which has received the royal assent would be seriously and most inconveniently impaired. In a solitary case, however, before the passing of the Act of 1946 (The Statutory Instruments Act) *Johnson v Sargent*,¹ Bailhache, J., held that an Order did not take effect until it became known. The reasoning was that statutes at least received the publicity of Parliamentary debate, and that therefore they were, or should be, known, but that this was not true of delegated legislation, which did not necessarily receive any publicity in Parliament or in any other way.

This was a bold example of judgment-made law. There was no precedent for it, and indeed a decision, *Jones v. Robson*³ which, though not on all fours, militated strongly against the judge's conclusion, was not cited, nor did the judge attempt to define how and when delegated legislation became known. Both arguments and judgment are very brief. The decision has always been regarded as very doubtful, but it never came under review by a higher Court "

We see great force in the learned author's comment on the reasoning in *Sargent's case*¹. Taking the present case, the question would immediately arise: Is it to be made known in India or throughout the world, for the argument on behalf of the respondent was that when the respondent left Geneva on 27th November, he was not aware of the change in the content of the exemption granted by the Reserve Bank. In a sense the knowledge of the existence or content of a law by an individual would not always be relevant, save on the question of the sentence to be imposed for its violation. It is obvious that for an Indian law to operate and be effective in the territory where it operates, viz., the territory of India it is not necessary that it should either be published or be made known outside the country. Even if, therefore, the view enunciated by Bailhache, J., is taken to be correct, it would be apparent that the test to find out effective publication would be publication in India, not outside India so as to bring it to the notice of everyone who intends to pass through India. It was "published" and made known in India by publication in the Gazette on the 24th November, and the ignorance of it by the respondent who is a foreigner

1. L R. (1918) 1 K.B. 101.

3. L R. (1901) 1 Q B. 673.

2. Law and Orders (Second Edition) at p.132.

is, in our opinion, wholly irrelevant. It is, no doubt, admitted on behalf of the prosecution in the present case that the respondent did not have actual notice of the Notification of the Reserve Bank dated 8th November, 1962, but for the reasons stated, it makes, in our opinion, no difference to his liability to be proceeded against for the contravention of section 8 (1) of the Act.

Learned Counsel for the respondent also referred us to the decision of the Bombay High Court in *Imperator v. Leslie Gwillt*¹, where the question of the proper construction and effect of rule 119 of the Defence of India Rules, 1937, came up for consideration. The learned Judges held that there had not been a proper publication or notification of an order, as required by rule 119 and that in consequences the accused could not be prosecuted for a violation of that order. Other decisions of a like nature dealing with the failure to comply with the requirements of rule 119 of the Defence of India Rules or the Essential Supplies Act, or the Essential Commodities Act, were also brought to our notice but we consider that they do not assist us in the present appeal. Where there is a statutory requirement as to the mode or form of publication and they are such that, in the circumstances, the Court holds to be mandatory, a failure to comply with those requirements might result in there being no effective order the contravention of which could be the subject of prosecution but where there is no statutory requirement we conceive the rule to be that it is necessary that it should be published in the usual form *i.e.*, by publication within the country in such media as is generally adopted to notify to all the persons concerned the making of Rules. In most of the Indian statutes, including the Act now under consideration, there is provision for the Rules made being published in the Official Gazette. It therefore stands to reason that publication in the Official Gazette, *viz.*, the Gazette of India is the ordinary method of bringing a rule or subordinate legislation to the notice of the persons concerned. As we have stated earlier, the Notification by the Reserve Bank was published in the Gazette of India on 24th November, 1962 and hence even adopting the view of Bailhache, J., the Notification must be deemed to have been published and brought to the notice of the concerned individuals on the 25th of November, 1962. The argument, therefore, that the Notification dated 8th November, 1962, was not effective, because it was not properly published in the sense of having been brought to the actual notice of the respondent must be rejected.

Before parting from this topic we would desire to make an observation. There is undoubtedly a certain amount of uncertainty in the law except in cases where specific provision in that behalf is made in individual statutes as to (a) when subordinate legislation could be said to have been passed, and (b) when it comes into effect. The position in England has been clarified by the Statutory Instruments Act of 1946, though there is a slight ambiguity in the language employed in it, which has given rise to disputed questions of construction as regards certain expressions used in the Act. We consider that it would be conducive to clarity as well as to the avoidance of unnecessary technical objections giving occasion for litigation if an enactment on the lines of the U.K. Statutory Instruments Act, 1946, were made in India either by an amendment of the General Clauses Act, or by independent legislation keeping in mind the difficulties of construction to which the U.K. enactment has given rise. As we have pointed out, so far as the present case is concerned, even on the narrowest view of the law the Notification of the Reserve Bank must be deemed to have been published in the sense of having been brought to the notice of the relevant public at least by 25th November, 1962 and hence the plea by the respondent that he was ignorant of the law cannot afford him any defence in his prosecution.

The last of the points urged by learned Counsel for the respondent was as regards the construction of the new second proviso which had been introduced by the Notification of the Reserve Bank dated 8th November, 1962. The argument was that the gold that the respondent carried was his personal luggage and not "cargo"—either "bottom cargo" or "transshipment cargo"—and that there-

1. I.L.R. (1945) Bom 681 : A I R. 1945 Bom. 368.

fore could not, and need not have been entered in the manifest of the aircraft and hence the second proviso could not be attracted to the case. The entire submission on this part of the case was rested on the meaning of the word 'cargo,' the point sought to be made being that what a passenger carried with himself or on his person could not be 'cargo' and that cargo was that which was handed over to the carrier for carriage. Reliance was, in this connection placed on the definition of the term 'cargo' in dictionaries where it is said to mean "the merchandise or wares contained or conveyed in a ship". We find ourselves unable to accept this argument. To say that the 2nd proviso refers only to what is handed over to the ship or aircraft for carriage would make the provision practically futile and unmeaning. If all the goods or articles retained by a passenger in his own custody or carried by him on his person were outside the 2nd proviso, and the provision were attracted only to cases where the article was handed over to the custody of the carrier, it would have no value at all as a condition of exemption. The goods entrusted to a carrier would be entered in the manifest and if they are not, it must be owing to the fault of the carrier, and it could hardly be that the passenger was being penalised for the default of the carrier. If the carriage of the goods on the person or in the custody of the passenger were exempt, there would be no scope at all for the operation of the 2nd proviso. We therefore consider that the proper construction of the term 'cargo' when it occurs in the Notification of the Reserve Bank is that it is used as contra-distinguished from personal luggage in the law relating to the carriage of goods. The latter has been defined as whatever a passenger takes with him for his personal use or convenience, either with reference to his immediate necessities or for his personal needs at the end of his journey. Obviously, the gold of the quantity and in the form in which it was carried by the respondent would certainly not be 'personal luggage' in the sense in which 'luggage' is understood, as explained earlier. It was really a case of merchandise not for the use of the passenger either during the journey or thereafter and therefore could not be called personal luggage or baggage. It was, therefore, 'cargo' which had to be manifested and its value must have been inserted in the air consignment note. In this connection, reference may usefully be made to certain of the International Air Traffic Association's General Conditions of Carriage not as directly governing the contract between the respondent and the aircraft but as elucidating the general practice of transport by air in the light of which the 2nd proviso has to be understood. Part A entitled "Carriage of Passengers and Baggage" by its Article 8, para. 1 (c) excludes goods which are merchandise from the obligation of carriers to transport as luggage or as baggage, while Article 3 of Part B dealing with carriage of goods provides that gold is accepted for carriage only if securely packed and its value inserted in the consignment note under the heading "Quantity and nature of goods".

Some point was made of the fact that if the second proviso were applied to the case of gold or articles made of gold carried on the person, a tie-pin or a fountain-pen which had a gold nib carried by a through passenger might attract the prohibition of section 8 (1) read with the exemption by the Reserve Bank as it now stands and that the Indian law would be unnecessarily harsh and unreasonable. We do not consider this correct, for a clear and sharp distinction exists between what is personal baggage and what is not and it is the latter that is 'cargo' and has to be entered in the manifest. If a person chooses to carry on his person what is not personal baggage or luggage understood in the legal sense but what should properly be declared and entered in the manifest of the aircraft there can be no complaint of the unreasonableness of the Indian law on the topic.

The result, therefore, is that we consider that the learned Judges of the High Court erred in acquitting the respondent. The appeal has, therefore, to be allowed and the conviction of the respondent restored.

Now, coming to the question of sentence to be passed on the appellant, it is undoubtedly the settled rule of this Court that it would not interfere with the sentence passed by the Courts below unless there is any illegality in it or the same involves

SUPREME COURT RULES, 1966

The Supreme Court Rules, 1966.¹

G.S.R. 103.—*New Delhi, the 30th December, 1955* The following is published for general information: In exercise of the powers conferred by Article 145 of the Constitution, and all other powers enabling it in this behalf, the Supreme Court hereby makes with the approval of the President, the following rules, namely :—

PART I—GENERAL.

ORDER I.

INTERPRETATION, ETC.

1. (1) These rules may be cited as the Supreme Court Rules, 1966.

(2) They shall come into force on such date as the Chief Justice of India may, by notification in the Official Gazette, appoint† and different dates may be appointed for different provisions of these rules :

4 Provided that proceedings pending in the Supreme Court or any High Court in relation to appeals by virtue of certificates granted under Article 132 (1), Article 133 (1) or Article 135 of the Constitution shall, unless otherwise ordered by this Court, be governed by the rules in force prior to the appointed date, and all steps therein shall continue to be taken in accordance with the said rules.

2. (1) In these rules, unless the context otherwise requires—

(a) 'advocate' means a person whose name is entered on the common roll maintained under section 20 of the Advocates Act, 1961 (XXV of 1961).

(b) 'advocate on record' means an advocate who is entitled under these rules to act as well as to plead for a party in the Court;

(c) 'appointed day' means the date on which these rules shall come into force ;

(d) 'Chief Justice' means the Chief Justice of India, and includes a Judge appointed under Article 126 of the Constitution to perform the duties of the Chief Justice ;

(e) 'Code' means the Code of Civil Procedure, 1908 (V of 1908) ;

(f) 'Constitution' means the Constitution of India ;

(g) 'Court' and 'this Court' means the Supreme Court of India ;

(h) 'Court appealed from' includes a tribunal or any other judicial body from which an appeal is preferred to the Court ;

(i) 'High Court' means—

(i) as respects anything done before the commencement of the Constitution, a High Court within the meaning of section 219 of the Government of India Act, 1935 ; and

(ii) as respects anything done or to be done after the commencement of the Constitution, a High Court established by or recognised under the Constitution ;

(j) 'Judge' means a Judge of the Court ;

(k) 'judgment' includes decree, order, sentence or determination of any Court, tribunal, judge or judicial officer ;

(l) 'prescribed' means prescribed by or under these rules ;

(m) 'record' in Part II of these rules means the aggregate of papers relating to an appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before the Court at the hearing of the appeal ;

(n) 'Registrar' and 'Registry' means respectively the Registrar and Registry of the Court ;

(o) 'respondent' includes an intervener ,

(p) 'the rules' and 'rules of Court' mean these rules and include the forms appended to these rules ;

(q) 'Senior advocate' means any advocate so designated under sub-section (2) of section 16 of the Advocates Act, 1961 (XXV of 1961), and all such advocates whose names were borne on the roll of the senior advocates of the Court immediately before the commencement of Chapter III of the Advocates Act, 1961 ;

(r) "Taxing Officer" means the officer of the Court whose duty it is to tax costs of proceedings in the Court

(2) The General Clauses Act, 1897 (X of 1897) shall apply for the interpretation of these rules as it applies for the interpretation of an Act of Parliament.

3. Where, by these rules or by any order of the Court, any step is required to be taken in connection with any cause, appeal, or matter before the Court, that step shall, unless the context otherwise requires, be taken in the Registry.

1. Published in the *Gazette of India* (Extraordinary), Part II, section 3 (i), page 13, dated 15th January, 1966.

†**G.S.R. 102.**—*New Delhi, the 30th December, 1965.*

In exercise of the powers conferred by rule 1 of Order I, of the Supreme Court Rules, 1966, the Hon'ble the Chief Justice of India has been pleased to appoint the 1st day of March, 1966, as the date from which the Supreme Court Rules, 1966, shall come into force.

4. Where any particular number of days is prescribed by these rules, or is fixed by an order of the Court, in computing the same, the day from which the said period is to be reckoned shall be excluded, and, if the last day expires on a day when the Court is closed, that day and any succeeding days on which Court remains closed shall also be excluded.

ORDER II.

OFFICES OF THIS COURT : SITTINGS AND VACATION, ETC

1. Except during vacation and on Saturdays and holidays, the offices of the Court, shall, subject to any order by the Chief Justice, be open daily from 10 A.M. to 5 P.M., but no work, unless of an urgent nature, shall be admitted after 4-30 P.M.

2. The offices of the Court shall, except during vacation, be open on Saturdays from 10-30 A.M. to 1-30 P.M., but no work, unless of an urgent nature, shall be admitted after 12-30 P.M.

3. Except on Saturdays and holidays, the offices of the Court shall be open during vacation at such times as the Chief Justice may direct.

4. (1) The Court shall sit in two terms annually, the first commencing from the termination of the summer vacation and ending with the day immediately preceding such day in December as the Court may fix for the commencement of the Christmas and New Year holidays and the second commencing from the termination of the Christmas and New Year holidays and ending with the commencement of the summer vacation.

(2) The period of the summer vacation shall not exceed ten weeks.

(3) The length of the summer vacation and the number of holidays shall be such as may be fixed by the Chief Justice and notified in the Official Gazette so as not to exceed one hundred and three days (excluding Sundays not falling in the vacation and during holidays).

5. The Court shall not ordinarily sit on Saturdays, nor on any other days notified as Court holidays in the Official Gazette.

6. The Chief Justice may appoint one or more Judges to hear during summer vacation or winter holidays all matters of an urgent nature which under these rules may be heard by a Judge sitting singly and, whenever necessary, he may likewise appoint a Division Court for the hearing of urgent cases during the vacation which require to be heard by a Bench of Judges.

ORDER III.

OFFICERS OF THE COURT, ETC

1. The Registrar shall have the custody of the records of the Court and shall exercise such other functions as are assigned to him by these Rules.

2. The Chief Justice may assign, and the Registrar may, with the approval of the Chief Justice, delegate to a Deputy Registrar or Assistant Registrar, any functions required by these rules to be exercised by the Registrar.

3. In the absence of the Registrar, the Deputy Registrar may exercise all the functions of the Registrar.

4. The Official seal to be used in the Court shall be such as the Chief Justice may from time to time direct, and shall be kept in the custody of the Registrar.

5. Subject to any general or special directions, given by the Chief Justice, the seal of the Court shall not be affixed to any writ, rule, order, summons or other process save under the authority in writing of the Registrar, or Deputy Registrar.

6. The seal of the Court shall not be affixed to any certified copy issued by the Court save under the authority in writing of the Registrar or of a Deputy Registrar or Assistant Registrar.

7. (1) The Registrar shall keep a list of all cases pending before the Court, and shall, at the commencement of each term, prepare and publish on the notice board of the Court a list of all cases ready for hearing in each class separately, to be called the "ready list". The cases in the "ready list" shall be arranged yearwise in each class separately in the order of their registration, and the list shall be added to from time to time as and when fresh cases become ready for hearing.

(2) Out of the "ready list" the Registrar shall publish on the notice board of the Court at the end of each month a list of cases to be heard during the following month. Subject to any general or special directions that may be given by the Chief Justice and subject to the orders of the Court and the other provisions of these rules, the cases listed for hearing in the monthly list in each class shall be in the order in which the cases have been registered. From out of the monthly list, the Registrar shall publish at the end of each week a list of cases to be heard in the following week, as far as possible, in the order in which they appear in the monthly list, subject to the directions of the Chief Justice and of the Court, if any, and out of the weekly list shall publish at the end of each day a daily list of cases to be heard by the Court on the following day.

8. In addition to the powers conferred by other rules, the Registrar shall have the following duties and powers subject to any general or special order of the Chief Justice, namely:—

(i) to require any plaint, petition of appeal, petition or other proceeding presented to the Court to be amended in accordance with the practice and procedure of the Court or to be represented after such requisition as the Registrar is empowered to make in relation thereto has been complied with;

(ii) to fix the date of hearing of appeals, petitions or other proceedings and issue notices thereof;

(iii) to settle the index in cases where the record is prepared in the Court;

(iv) to make an order for change of advocate on record with the consent of the advocate on record ;

(v) to direct any formal amendment of record ;

(vi) to grant leave to inspect and search the records of the Court and order the grant of copies of documents to parties to proceedings ;

and without interfering or dispensing with any mandatory requirement of these Rules—

(vii) to allow from time to time on a written request any period or periods not exceeding twenty-eight days in aggregate for furnishing information or for doing any other act necessary to bring the plaint, appeal, petition or other proceeding in conformity with the rules and practice of the Court.

ORDER IV.

ADVOCATES.

1. Subject to the provisions of these rules only those advocates whose names are entered on the common roll maintained by the Bar Council of India under section 20 of the Advocates Act, 1961 (XXV of 1961) shall be entitled to appear and plead before the Court :

Provided that the Court may, if for any special reason it thinks desirable to do so, permit any other person to appear before it in a particular case.

(a) The Chief Justice and the Judges may, with the consent of the advocate, designate an advocate as senior advocate if in their opinion by virtue of his ability, experience and standing at the Bar the said advocate is deserving of such distinction.

(b) A senior advocate shall not—

(i) file a vakalatnama or act in any Court or tribunal in India.

(ii) appear without an advocate on record in the Court or without a junior in any other Court or tribunal in India,

(iii) accept instructions to draw pleadings or affidavits, advice on evidence or do any drafting work of an analogous kind in any Court or tribunal in India or undertake conveyancing work of any kind whatsoever but this prohibition shall not extend to settling any such matter as aforesaid in consultation with a junior,

(iv) accept directly from a client any brief or instructions to appear in any Court or tribunal in India.

Explanation :

In this Order—

(i) 'acting' means filing an appearance or any pleadings or applications in any Court or tribunal in India, or any act (other than pleading) required or authorised by law to be done by a party in such Court or tribunal either in person or by his recognised agent or by an advocate or attorney on his behalf.

(ii) 'tribunal' includes any authority or person legally authorised to take evidence and before whom advocates are, by or under any law for the time being in force, entitled to practise.

(iii) 'junior' means an advocate other than a senior advocate.

(c) Upon an advocate being designated as a senior advocate, the Registrar shall communicate to all the High Courts and the Secretary to the Bar Council of India the name of the said Advocate and the date on which he was so designated.

3. Every advocate appearing before the Court shall wear such robes and costume as may from time to time be directed by the Court.

4. Any advocate not being a senior advocate may, on his fulfilling the conditions laid down in rule 5, be registered in the Court as an advocate on record :

Provided that notwithstanding anything contained in rule 5, any advocate whose name was registered with the Registrar as an advocate on record immediately before the 8th day of September, 1962, shall be registered as an advocate on record

5. No advocate shall be qualified to be registered as an advocate on record unless he—

(i) has undergone training for one year with an advocate on record approved by the Court, and has thereafter passed such tests as may be held by the Court for advocates who apply to be registered as advocates on record, particulars whereof shall be notified in the Official Gazette from time to time, provided however that an attorney shall be exempted from such training and test ;

(ii) has an office in Delhi within a radius of 10 miles from the Court House and gives an undertaking to employ, within one month of his being registered as advocate on record, a registered clerk ; and

(iii) pays a registration fee of twenty-five rupees

6. (a) An advocate on record shall, on his filing a memorandum of appearance on behalf of a party accompanied by a vakalatnama duly executed by the party, be entitled—

(i) to act as well as to plead for the party in the matter and to conduct and prosecute before the Court all proceedings that may be taken in respect of the said matter or any application connected with the same or any decree or order passed therein including proceedings in taxation and applications for review ; and

(ii) to deposit and receive money on behalf of the said party.

(b) No advocate other than an advocate on record shall be entitled to file an appearance or act for a party in the Court.

(c) Every advocate on record shall keep such books of account as may be necessary to show and distinguish in connection with his practice as an advocate on record—

(i) moneys received from or on account of and the moneys paid to or on account of each of his clients ; and

(ii) the moneys received and the moneys paid on his own account.

(d) Every advocate on record shall, before taxation of the Bill of Costs, file with the Taxing Officer a certificate showing the amount of fee paid to him or agreed to be paid to him by his client.

7. Where an advocate on record ceases to have an officer or a registered clerk or both as required by clause (ii) of rule 5, notice shall issue to such advocate to show cause before the Chamber Judge on a date fixed, why his name should not be struck off the register of advocates on record, and if the Chamber Judge makes such an order, the name of such advocate shall be removed from the register accordingly and the advocate shall thereafter cease to be entitled to act as an advocate on record.

8. Where an advocate on record is suspended or his name is removed from the common roll maintained under the Advocates Act, 1961 (XXV of 1961), he shall, unless otherwise ordered by the Court, be deemed as from the date of the order of the State Bar Council or the Bar Council of India, as the case may be, to be suspended or removed from the register of advocates on record for the same period as is mentioned in the order of the State Bar Council or the Bar Council of India, as the case may be.

9. Any advocate on record may at any time by letter request the Registrar to remove his name from the register of advocates on record, absolutely or subject to his continuing to act as advocate on record in respect of all or any of the pending cases in which he may have filed a vakalatnama, of which he shall file a list. The Registrar shall thereupon remove his name from the register of advocates on record, absolutely or subject as aforesaid.

10. No advocate other than an advocate on record shall appear and plead in any matter unless he is instructed by an advocate on record.

11. Every advocate on record shall notify to the Registrar the address of his office in Delhi and every change of such address, and any notice, writ, summons, or other document served on him or his clerk at the address so notified by him shall be deemed to have been properly served.

12. (1) An advocate on record or a firm of advocates may employ one or more clerks to attend the Registry for presenting or receiving any papers on behalf of the said advocates or firm of advocates :

Provided that the clerk has been registered with the Registrar on an application in the prescribed form made to the Registrar for the purpose :

Provided further that the said clerk gives an undertaking that he shall attend the Registry regularly.

(2) Notice of every application for the registration of a clerk shall be given to the Secretary, Supreme Court Bar Association, who shall be entitled to bring to the notice of the Registrar within seven days of the receipt of the notice any facts which in his opinion may have a bearing on the suitability of the clerk to be registered.

(3) The Registrar may decline to register any clerk who in his opinion is not sufficiently qualified, or is otherwise unsuitable to be registered as such, and may for reasons to be recorded in writing, remove from the register the name of any clerk after giving him and the employer an opportunity to show cause against such removal. Intimation shall be given to the Secretary, Bar Association, of every order registering a clerk or removing a clerk from the register.

(4) Every clerk shall, upon registration, be given an identity card which he shall produce whenever required, and which he shall surrender when he ceases to be the clerk of the advocate or firm of advocates, for whom he was registered. Where a fresh identity card is required in substitution of one that is lost or damaged, a fee of three rupees shall be levied for the issue of the same.

(5) Every advocate on record shall have a registered clerk. No advocate may employ as his clerk any person who is a tout.

13. (1) The Registrar shall publish lists of persons proved to his satisfaction, by evidence of general repute or otherwise, habitually to act as touts to be known as 'list of touts' and may, from time to time, alter and amend such lists.

A copy of every list of touts shall be displayed on the notice board of the Court.

Explanation :

In this Order—

(a) 'tout' means a person who procures, in consideration of any remuneration moving from any advocate or from any person acting on his behalf, the employment of such advocate in any legal business, or who proposes to or procures any advocate, in consideration of any remuneration moving from such advocate or from any person acting on his behalf, the employment of the advocate in such business, or who, for purposes of such procurement, frequents the precincts of the Court ;

(b) the passing of a resolution by the Supreme Court Bar Association or by a High Court Bar Association declaring any person to be a tout shall be evidence of general repute of such person for the purpose of this rule.

(2) No person shall be included in the list of touts unless he has been given an opportunity to show cause against the inclusion of his name in such list. Any person may appeal to the Chamber Judge against the order of the Registrar including his name in such list.

(3) The Registrar may, by general or special order, exclude from the precincts of the Court all such persons whose names are included in the list of touts.

14. No person having an advocate on record shall file a vakalatnama authorising another advocate on record to act for him in the same case save with the consent of the former advocate on record or by leave of the Judge in Chambers, unless the former advocate on record is dead, or is unable by reason of infirmity of mind or body to continue to act.

15. Where a party changes his advocate on record, the new advocate on record shall give notice of the change to all other parties appearing.

16. No advocate on record may, without the leave of the Court, withdraw from the conduct of any case by reason only of the non-payment of fees by his client.

17. No person having an advocate on record shall be heard in person save by special leave of the Court.

18. No advocate on record shall authorise any person whatsoever, except another advocate on record, to act for him in any case.

19. Every advocate on record shall be personally liable to the Court for the due payment of all fees and charges payable to the Court.

20. Two or more advocates on record may enter into a partnership with each other and any partner may act in the name of the partnership provided that the partnership is registered with the Registrar. Any change in the composition of the partnership shall be notified to the Registrar.

21. Two or more advocates not being senior advocates or advocates on record, may enter into partnership and subject to the provisions contained in rule 9, anyone of them may appear in any cause or matter before the Court in the name of the partnership.

ORDER V.

APPEALS UNDER SECTION 38 OF THE ADVOCATES ACT, 1961 (XXV OF 1961).

1. An appeal from an order made, by the Disciplinary Committee of the Bar Council of India under section 36 or section 37 of the Advocates Act, 1961 (XXV of 1961) shall be lodged in the Court within sixty days from the date on which the order complained of is communicated to the aggrieved person :

Provided that in computing the period of sixty days the time requisite for obtaining an authenticated copy of the order sought to be appealed from shall be excluded

2. The memorandum of appeal shall be in the form of a petition. It shall state succinctly and clearly all the relevant facts leading up to the order complained of, and shall set forth in brief the objections to the decision appealed from and the grounds relied on in support of the appeal. The petition shall also state the date on which the order complained of was received by the appellant. The allegations of facts contained in the petition which cannot be verified by reference to the duly authenticated copies of the documents accompanying it shall be supported by affidavit of the appellant.

3. The petition shall be divided into paragraphs, numbered consecutively, each paragraph being confined to a distinct portion of the subject and shall be typed or cyclostyled or printed on one side of standard petition paper, demy-folscap size, or on paper of equally superior quality.

4. The petition shall be made on a court-fee stamp of the value of ten rupees and shall be signed by the appellant, where the appellant appears in person, or by a duly authorised advocate on record on his behalf.

5. The petition of appeal shall be accompanied by—

- (i) an authenticated copy of the decision sought to be appealed from ; and
- (ii) at least seven spare sets of the petition and the papers filed with it.

6. The Registrar after satisfying himself that the petition of appeal is in order shall endorse thereon the date of presentation, register the same as an appeal and send a copy thereof to the Secretary, Bar Council of India, for record.

7. On the registration of the petition of appeal, the Registrar shall, after notice to the appellant or his advocate on record, if any, post the appeal before the Court for preliminary hearing and for orders as to issue of notice. Upon such hearing, the Court, if satisfied that no *prima facie* case has been made out for its interference, may dismiss the appeal, and, if not so satisfied, direct that notice of the appeal be issued to the Advocate-General of the State concerned or to the Attorney-General for India or to both and to the respondent.

8. Within ten days of the receipt by him of the intimation of admission of appeal under rule 7 the Secretary of the Bar Council of India shall transmit to the Court the entire original record relating to the case and such number of copies of the paper books prepared for the use of the Disciplinary Committee of the Bar Council of India as may be available.

9. Within fifteen days of the service of the notice of admission of appeal under rule 7 the Advocate-General of the State or the Attorney-General or the respondent may cause an appearance to be entered either personally or by an advocate on record on his behalf.

10. Where a respondent does not enter appearance within the time limited under rule 9, the appeal shall be set down for hearing *ex parte* as against him on the expiry of the period of one month from the receipt by him of the notice of the admission of appeal.

11. After the receipt of the original record the Registrar shall with all convenient speed, in consultation with the parties to the appeal, select the documents necessary and relevant for determining the appeal and cause sufficient number of copies of the said record to be typed or cyclostyled or printed at the expense of the appellant.

12. Unless otherwise ordered by the Court every appeal under this Order shall be made ready and if possible posted for hearing before the Court within four months of the registration thereof

13. Where the appellant fails to take any steps in the appeal within the time fixed for the purpose by these rules or unduly delays in bringing the appeal to a hearing, the Registrar shall call upon him to explain his default and if no explanation is offered, or if the explanation offered is, in the opinion of the Registrar, insufficient, the Registrar may after notifying all the parties who have entered appearance, place the appeal before the Court for orders on the default, and the Court may dismiss the appeal for want of prosecution or give such directions in the matter as it may think fit and proper.

14. The costs of and incidental to all proceedings in the appeal shall be in the discretion of the Court.

ORDER VI.

BUSINESS IN CHAMBERS.

1. The powers of the Court in relation to the following matters may be exercised by the Registrar, namely —

- (1) Applications for discovery and inspection.
- (2) Applications for delivery of interrogatories
- (3) Applications for substituted service, or for dispensing with service of notice of the appeal on any of the respondents to the appeal under rule 10 of Order XV.
- (4) Applications for time to plead, for production of documents, and generally relating to the conduct of cause, appeal or matter save those coming under rule 2 of this Order.
- (5) Applications for leave to take documents out of the custody of the Court.
- (6) Questions arising in connection with the payment of court-fees.
- (7) Applications by third parties for return of documents.
- (8) Applications for grant of copies of records to third parties.
- (9) Applications for the issue of a certificate regarding any excess court-fee paid under a mistake.
- (10) Applications for requisitioning records from the custody of any Court or other authority.
- (11) Applications for condoning delay in paying deficit court-fees or delay in representation
- (12) Application for condonation of delay in filing statement of case, provided that where the Registrar does not think fit to excuse the delay, he shall refer the application to the Court for orders.
- (13) Applications for appointment and for approval of a translator or interpreter.
- (14) Applications for withdrawal of appeal by an appellant prior to his lodging the petition of appeal.
- (15) Applications for substitution, except where the substitution would involve setting aside an abatement.
- (16) Applications for production of documents outside Court premises.
- (17) Applications for change or discharge of advocate on record.
- (18) Applications to withdraw suits.
- (19) Applications for payment into Court.
- (20) Applications for payment out of Court of money or security, or interest or dividend on securities.
- (21) Applications for extending returnable dates of warrants.
- (22) Applications to appoint or discharge a next friend or guardian of a minor or a person of unsound mind and direct amendment of the record thereon.
- (23) Applications for refund of security or part thereof, or for payment out of security amount.

2. The powers of the Court in relation to the following matters may be exercised by a Single Judge sitting in Chambers, namely —

- (1) Applications by advocate on record for leave to withdraw.
- (2) Applications for leave to compromise or discontinue an appeal *in forma pauperis*.
- (3) Applications for striking out or adding party or for intervention in a suit, appeal or other proceeding.
- (4) Applications for separate trials of causes of action.
- (5) Applications for separate trials to avoid embarrassment.
- (6) Rejection of plaint.
- (7) Applications for setting down for judgment in default of written statement.
- (8) Applications for better statement of claim or defence.
- (9) Applications for particulars
- (10) Applications for striking out any matter in a pleading.

- ing.
- (11) Applications for amendment of pleading and for enlargement of time to amend any pleading.
 - (12) Applications to tax bills returned by the Taxing Officer.
 - (13) Applications for review of taxation.
 - (14) Applications for enlargement or abridgement of time except where the time is fixed by the Court or relates to deposit of security and except applications for condonation of delay in filing special leave petitions.
 - (15) Applications for issue of commissions.
 - (16) Applications for security for costs.
 - (17) Applications for assignment of security bonds.
 - (18) Questions arising in taxation referred by the Taxing Officer.
 - (19) Applications for orders against clients for payment of costs.
 - (20) Applications for taxation and delivery of bills of costs, and for delivery by an advocate of documents and papers.
 - (21) Applications for registration of advocates as advocates on record.
 - (22) Applications for leave to proceed *in forma pauperis*.
 - (23) Applications for grant of bail where the petitioner is confined in jail.
 - (24) Applications for stay of execution of a sentence or order in criminal proceedings.
 - (25) Applications by accused persons in custody for being produced before the Court at the hearing of the appeal.
 - (26) Consent applications in interlocutory matters
 - (27) Applications by accused persons for engagement of advocate under rule 25 of Order XXI.
 - (28) Fixing the remuneration of a guardian *ad litem*.
 - (29) Applications for directions regarding the preparation of record in an appeal, petition, or other proceeding.
 - (30) Applications for dispensing with advocate's certificate in Review Applications.
 - (31) Applications to dispense with statements of case in criminal appeals.

3. Any person aggrieved by any order made by the Registrar under this Order may, within fifteen days of the making of such order, appeal against it to the Judge in Chambers.

4. The Registrar may, and, if so directed by the Judge in Chambers, shall, at any time adjourn any matter and lay the same before the Judge in Chambers, and the Judge in Chambers may at any time adjourn any matter and lay the same before the Court.

ORDER VII

CONSTITUTION OF DIVISION COURTS AND POWERS OF A SINGLE JUDGE.

- 1 Subject to the other provisions of these rules, every cause, appeal or matter shall be heard by a Bench consisting of not less than two Judges nominated by the Chief Justice.
2. Where in the course of the hearing of any cause, appeal or other proceeding, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it
3. The Chief Justice may from time to time appoint a Judge to hear and dispose of all applications which may be heard by a Judge in Chambers under these rules
4. During the vacation, the Vacation Judge sitting singly may, in addition to exercising all the powers of a Judge in Chambers under these rules, exercise the powers of the Court in relation to the following matters, namely:—
 - (1) Application for special leave to appeal in urgent cases where interim relief is prayed for subject to the condition that the Vacation Judge shall not decide such a petition if it raises a substantial question of law as to the interpretation of the Constitution.
 - (2) Applications for stay of execution of a decree or order or stay of proceedings in civil matters
 - (3) Applications for transfer of cases under section 527 of the Code of Criminal Procedure, 1898 (V of 1898).
 - (4) Applications for stay of proceedings in criminal matters.
 - (5) Applications under Article 32 of the Constitution of an urgent nature which do not involve a substantial question of law as to the interpretation of the Constitution
 - (6) Issue of a rule nisi in urgent applications under Article 32 of the Constitution which involve a substantial question of law as to the interpretation of the Constitution.

ORDER VIII

NOTICES OF MOTION

1. Except where otherwise provided by any statute or prescribed by these rules, all applications which in accordance with these rules cannot be made in Chambers shall be made on motion after notice to the parties affected thereby
2. Where the delay caused by notice would or might entail serious hardship, the applicant may pray for an *ad interim ex parte* order in the notice of motion, and the Court, if satisfied upon affidavit or

otherwise that the delay caused by notice would entail serious hardship, may make an order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking being given, if any, as the Court may think just, pending orders on the motion after notice to the parties affected thereby.

3 Where an *ex parte* order is made by the Court, unless the Court has fixed a date for the return of the notice, or otherwise directs, the Registrar shall fix a date for the return of the notice and the application by notice of motion shall be posted before the Court for final orders on the returnable date.

4. A notice of motion shall be instituted in the suit or matter in which the application is intended to be made and shall state the time and place of application and the nature of the order asked for and shall be addressed to the party or parties, intended to be affected by it, unless they have an advocate on record, in which case it will be addressed to the advocate on record, and shall be signed by the advocate on record of the party moving, or by the party himself where he acts in person.

5. (1) Unless otherwise ordered, the notice of motion together with affidavit in support thereof shall be served on the opposite party not less than seven days before the day appointed for the motion where such opposite party has entered appearance, and not less than fourteen days before the day appointed for the motion where such party has not entered appearance.

The affidavits in opposition shall be filed in this Registry not later than five days before the day appointed for the hearing and affidavits in reply shall be filed not later than two days before the day of hearing. The affidavits in opposition or reply shall be served on the opposite party or parties and shall not be accepted in the Registry unless they contain an endorsement of service signed by such party or parties.

(2) Leave to serve short notice of motion may be obtained *ex parte* from the Registrar upon affidavit.

6 Notice shall be given to the other party or parties of all grounds intended to be urged in support of, or in opposition to, any motion.

7 Any interlocutory or miscellaneous application, notwithstanding that it is made in an appeal or other proceeding, in which a substantial question of law as to the interpretation of the Constitution is raised may be heard and decided by a Bench of less than five Judges.

ORDER IX.

PROCEEDINGS BY OR AGAINST MINORS OR PERSONS OF UNSOUND MIND

1. Every appeal, petition or other proceeding by a minor shall be instituted or continued in his name by his next friend.

2. A next friend shall not retire without the leave of the Court. The Court may require him to procure a fit person to be in his place before he is permitted to retire, and may also, if it thinks fit, require him to furnish security for costs already incurred as a condition of his retirement.

3. (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a new next friend in his place.

(2) Where the advocate on record of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit as the next friend of such minor.

4. An application for the appointment of a new next friend of a minor shall be supported by an affidavit showing that the person proposed is a fit and proper person to be so appointed and has no interest adverse to that of the minor.

5. Where a respondent to an appeal or petition is a minor and is not represented by a guardian an application shall be made to the Court by the appellant or petitioner as the case may be or by some person interested in the minor for the appointment of a guardian of such minors; and it shall be supported by an affidavit stating that the proposed guardian has no interest in the matter in question in the appeal or petition adverse to that of the minor. Where a person other than the father or other natural guardian of the minor is proposed as guardian, notice of the application shall be served on the father or other natural guardian of the minor, or on the person with whom the minor resides, not less than fourteen days before the day named in the notice for the hearing of the application. Where there is no other person fit and willing to act as guardian, the Court may appoint an officer of the Court to be the guardian.

6. (1) No guardian of a minor shall retire from a suit, appeal or other proceeding without the leave of Court. Where a guardian of a minor fails to do his duty or other sufficient cause is shown for his removal the Court may remove him from the guardianship of the minor and make such other as to costs as it thinks fit.

(2) Where the guardian of a minor retires, dies or is removed by the Court during the pendency of the suit, appeal or other proceeding, the Court shall appoint a new guardian in his place.

7. When a guardian *ad litem* of a minor respondent is appointed, and it is made to appear to the Court that the guardian is not in possession of any, or sufficient funds for the conduct of the appeal or petition on behalf of the respondent, and that the respondent will be prejudiced in his defence thereby the Court may, in its discretion, from time to time, order the appellant or petitioner, as the case may be, to advance to the guardian of the minor for the purpose of his defence such moneys as the Court may fix, and all moneys so advanced shall form part of the costs of the appellant or petitioner in the appeal or petition, as the case may be. The order shall direct that the guardian do file in Court an account of the moneys so received by him.

8. An application to declare as a major a party to a proceeding described as a minor and to discharge his next friend or guardian shall be supported by an affidavit stating the age of the alleged major and the date on which he attained majority. Notice of the application shall be given to the next friend or guardian and to the alleged major.

9. No next friend or guardian of a minor in an appeal or other proceeding shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the appeal or proceeding in which he acts as next friend or guardian.

10. An application made to the Court for leave to enter into an agreement or compromise or for the withdrawal of any appeal or other proceeding in pursuance of a compromise on behalf of a minor, shall be supported by an affidavit from the next friend or guardian of the minor stating that the agreement or compromise is for the benefit of the minor, and, where the minor is represented by an Advocate, by a certificate or by a statement at the Bar from such advocate to the effect that the agreement or compromise is, in his opinion, for the benefit of the minor. A decree or order made in pursuance of the compromise of an appeal or other proceeding, to which a minor is party shall recite the sanction of the Court thereto and shall set out the terms of the compromise.

11. The provisions of this Order, so far as they are applicable, shall apply to persons adjudged to be of unsound mind and to persons who, though not so adjudged, are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when sued or being sued.

12. Save as aforesaid the provisions of Order XXXII of the Code relating to suits so far as applicable, shall apply *mutatis mutandis* to appeals and other proceedings in the Court.

ORDER X.

DOCUMENTS.

1. The officers of the Court shall not receive any pleading, petition, affidavit or other document, except original exhibits and certified copies of public documents, unless it is fairly and legibly written, type-writing or lithographed in double line spacing, on one side of standard petition paper, demy-fools-cap size, or paper which is ordinarily used in the High Courts for the purpose. Copies filed for the use of the Court shall be neat and legible, and shall be certified to be true copies by the advocate on record, or by the party in person, as the case may be.

2. No document in a language other than English shall be used for the purpose of any proceedings before the Court, unless it is accompanied by :

(a) a translation agreed to by both parties ; or

(b) a translation certified to be true translation by a translator appointed by the Court , or

(c) the said document is translated by a translator appointed or approved by the Court.

3. Every document required to be translated shall be translated by a translator appointed or approved by the Court :

Provided that a translation agreed to by both parties, or certified to be a true translation by the translator appointed or approved by the Court, may be accepted.

4. Every translator shall, before acting, make an oath or affirmation that he will translate correctly all documents given to him for translation

5. All plaints, petitions, applications and other documents shall be presented by the plaintiff, petitioner, applicant, appellant, defendant or respondent in person or by his duly authorised agent or by an advocate on record duly appointed by him for the purpose :

Provided that a party, who had been adjudged to be a pauper for the purpose of the proceedings in the courts below, may present the document before the judicial authority of the place where the said party resides, and the said judicial authority, after attesting the document and endorsing thereon under his seal and signature the date of presentation, shall transmit the same to the Court by registered post, acknowledgment due at the expense of the party concerned. The date of presentation in this Court of the said document shall be deemed to be the date endorsed thereon by the said judicial authority.

6. (1) All plaints, petitions, appeals or other documents shall be presented at the filing counter and shall, wherever necessary, be accompanied by the documents required under the Rules of the Court to be filed along with the said plaint, petition or appeal.

(2) On receipt of the document, the officer-in-charge of the filing counter shall endorse on the document the date of receipt and enter the particulars of the said document in the register of daily filing and cause it to be sent to the department concerned for examination. If, on a scrutiny, the document is found in order, it shall be duly registered and given a serial number of registration

(3) Where a document is found to be defective, the said document shall, after notice to the party filing the same be placed before the Registrar. The Registrar may, by an order in writing decline to receive the document if, in his opinion, the mandatory requirements of the rules are not satisfied. Where however, the defect noticed is formal, the Registrar may allow the party to rectify the same in his presence ; but in other cases, he may require the party to obtain an order from the Court permitting the party to rectify the same and for this purpose may allow to the party concerned, such time as may be necessary but not exceeding twenty-eight days in aggregate

(4) Where the party fails to take any steps for the removal of the defect within the time fixed for the same by the Registrar, the Registrar may, for reasons to be recorded in writing, decline to register the document.

(5) Any party aggrieved by any order made by the Registrar under this Rule may, within fifteen days of the making of such order, appeal against it to the Judge in Chambers

7. The Registrar may on an application by the party interested, order the return of a document filed in a suit, appeal or matter if the person applying therefor delivers in the office a certified copy thereof to be substituted for the original

8 (1) Except as otherwise provided by these rules or by law for the time being in force, the Court-fees set out in the Third Schedule to these Rules shall be payable on the documents mentioned therein, and no document chargeable with a fee under the said Schedule shall be received or filed in the Registry unless the fee prescribed has been paid on it. No copy of a document shall be furnished to any person unless the fee prescribed therefor has been paid

(2) All fees referred to in sub-rule (1) shall be collected in court-fee stamps sold in Delhi in accordance with the provisions of the Court-fees Act as in force in the Union territory of Delhi

(3) No document chargeable with a court-fee shall be acted upon in any proceedings in this Court until the stamp thereon has been cancelled

The officer receiving the document shall forthwith effect such cancellation by punching out the figure head so as to leave the amount designated on the stamp untouched and the part removed by punching shall be burnt or otherwise destroyed.

(4) Whenever a question of the proper amount of the Court-fees payable is raised, the Registrar or the Taxing Officer of the Court shall decide such question before the document or the proceeding is acted upon in the Registry and whenever it is found that due to a *bona fide* mistake the Court-fee paid is insufficient the Registrar shall call upon the party concerned to make good the deficiency within such time as the Registrar may think reasonable but not exceeding three months in any case

(5) In case the deficiency in the Court fee is made good within the time allowed, the date of the institution of the proceeding shall be deemed to be the date on which the proceeding was initially instituted

(6) The Registrar may in a proper case on an application made by the party issue a certificate regarding any excess Court fee paid under a mistake

9. (1) The levy and collection of Court fee under these rules shall be under the general superintendence of the Registrar of the Court who may be assisted in his supervision by the Assistant Registrars of the Court

(2) Where at any time during the course of the pendency of a suit, appeal or proceedings, or even after the conclusion of such a proceeding it appears to the Registrar or the Taxing Officer that through mistake or inadvertence a document which ought to be stamped in a certain manner has been received and acted upon without its being stamped or that the Court fee paid thereon initially was insufficient, the Registrar or the Taxing Officer shall record a declaration to that effect and determine the amount of deficiency in Court fee

Provided that no such declaration shall be made until the party liable to pay the Court fee has had an opportunity of being heard

(3) When a declaration has been recorded under sub-rule (2) and if that relates to a matter pending before the Court, the procedure prescribed by sub-rule (3) shall be followed; if it relates to the proceedings which have already been disposed of the Registrar shall, if the deficiency is not made good within three months of the declaration made, forward a requisition for the recovery of the same to the Central Government which shall recover the amount of such court fee from the person liable to pay the same as if it were an arrear of land revenue.

ORDER XI.

AFFIDAVITS.

1. The Court may at any time for sufficient reason, order that any particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit

2. Upon any application evidence may be given by affidavit; but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent, and such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court or the Court otherwise directs.

3. Every affidavit shall be intitled in the cause, appeal or matter in which it is sworn

4. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs to be numbered consecutively, and shall state the description, occupation, if any, and the true place of abode of the deponent.

5. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted, provided that the grounds thereof are stated

6. An affidavit requiring interpretation to the deponent shall be interpreted by an interpreter nominated or approved by the Court, if made within the State of Delhi, and if made elsewhere shall be interpreted by a competent person who shall certify that he has correctly interpreted the affidavit to the deponent.

7. Affidavits for the purposes of any cause, appeal or matter before the Court may be sworn before a Notary or any authority mentioned in section 139 of the Code or before the Registrar of this Court, or before a Commissioner generally or specially authorised in that behalf by the Chief Justice.

8. Where the deponent is a *purdahnashin* lady she shall be identified by a person to whom she is known and that person shall prove the identification by a separate affidavit.

9. Every exhibit annexed to an affidavit shall be marked with the title and number of the cause, appeal or matter and shall be initialled and dated by the authority before whom it is sworn.

10. No affidavit having any interlineation, alteration or erasure shall be filed in Court unless the interlineation or alteration is initialled, or unless in the case of an erasure the words or figures written on the erasure are rewritten in the margin and initialled, by the authority before whom the affidavit is sworn.

11. The Registrar may refuse to receive an affidavit where in his opinion the interlineations, alterations or erasures are so numerous as to make it expedient that the affidavit should be rewritten.

12. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used except by leave of the Court.

13. In this Order, affidavit includes a petition or other document required to be sworn or verified; and 'sworn' includes affirmed. In the verification of petitions, pleadings or other proceedings, statements based on personal knowledge shall be distinguished from statements based on information and belief. In the case of statements based on information, the deponent shall disclose the source of his information.

ORDER XII.

INSPECTION, SEARCH, ETC

1. Subject to the provisions of these rules, a party to any cause, appeal or matter who has appeared shall be allowed to search, inspect or get copies of all pleadings and other documents or records in the case, on payment of the prescribed fees and charges.

2. The Court, on the application of a person who is not a party to the case, appeal or matter, may on good cause sworn, allow such person such search or inspection or to obtain such copies as is or are mentioned in the last preceding rule, on payment of the prescribed fees and charges.

3. A search or inspection under rule 1 or rule 2 during the pendency of a cause, appeal or matter, shall be allowed only in the presence of an officer of the Court and after twenty-four hours' notice in writing to the parties who have appeared, and copies of documents shall not be allowed to be taken, but notes of the search or inspection may be made.

4. Copies required under rule 1 or rule 2 may be certified as correct copies by the Registrar, Deputy Registrar, Assistant Registrar or such other officer as may be authorised in that behalf by the Registrar.

5. An application may be made to the Registrar for the issue urgently of a copy of any judgment, decree or order of the Court or of any proceedings filed in the Court and upon the order being so made, the said copy shall be made ready and issued within seven days of the making of the application or such further time as the Registrar may specify.

6. No record or document filed in any cause, appeal or matter shall, without the leave of the Court, be taken out of the custody of the Court.

7. The Registrar may, in his discretion, permit any record to be sent to any Court, tribunal or other public authority on requisition received from such Court, tribunal or authority.

ORDER XIII.

JUDGMENTS, DECREES AND ORDERS.

1. The Court, after the case has been heard, shall pronounce judgment, in open Court, either at once or on some future day, of which due notice shall be given to the parties or their advocates on record, and the decree or order shall be drawn up in accordance therewith.

2. A member of the Court may read a judgment prepared by another member of the Court.

3. Subject to the provisions contained in Order XL of these rules, a judgment pronounced by the Court or by a majority of the Court or by a dissenting Judge in open Court shall not afterwards be altered or added to, save for the purpose of correcting a clerical or arithmetical mistake or an error arising from any accidental slip or omission.

4. Certified copies of the judgment, decree or order shall be furnished to the parties on requisition made for the purpose, and at their expense.

5. Every decree passed or order made by the Court shall be drawn up in the Registry and be signed by the Registrar or Deputy Registrar and sealed with the seal of the Court and shall bear the same date as the judgment in the suit or appeal.

6. The decree passed or order made by the Court in every appeal, and any order for costs in connection with the proceedings therein, shall be transmitted by the Registrar to the Court or tribunal from which the appeal was brought, and steps for the enforcement of such decree or order shall be taken in that Court or tribunal in the way prescribed by law.

7. Orders made by the Court in other proceedings shall be transmitted by the Registrar to the judicial or other authority concerned to whom such orders are directed, and any party may apply to the Judge in Chambers that any such order, including an order for payment of costs, be transmitted to any other appropriate Court or other authority for enforcement.

8. In cases of doubt or difficulty with regard to a decree or order made by the Court, the Registrar or the Deputy Registrar shall, before issuing the draft, submit the same to the Court.

9. Where the Registrar or the Deputy Registrar considers it necessary that the draft of any decree or order should be settled in the presence of the parties or where the parties require it to be settled in their presence, the Registrar or the Deputy Registrar shall, by notice in writing, appoint a time for settling the same and the parties shall attend the appointment and produce the briefs and such other documents as may be necessary to enable the draft to be settled.

10. Where any party is dissatisfied with the decree or order as settled by the Registrar, the Registrar shall not proceed to complete the decree or order without allowing that party sufficient time to apply by motion to the Court.

ORDER XIV.

PAYMENT INTO AND OUT OF COURT OF SUITORS' FUNDS.

1. Unless otherwise ordered, all monies directed to be paid into this Court to the credit of any suit, appeal or other proceeding, shall be paid into the Reserve Bank of India at New Delhi (hereinafter referred to as the Bank) into an account entitled 'Government A/c—P—Deposits and Advances—II Deposits Not Bearing Int—(C) Other Deposits A/cs—Deptl. and Judicial Deposits—Civil Deposits—Civil Court Deposits'.

2. Notwithstanding anything contained in rule 3, rule 4 or rule 5 of the Registrar may, in appropriate cases, authorise the acceptance of moneys by demand drafts issued in favour of the Registrar and payable in Delhi or New Delhi by a Scheduled Bank, and direct that the said amount be deposited with the Reserve Bank as provided by rule 1. On encashment, the date of tender in such cases shall be deemed to be the date on which the demand draft is presented for encashment;

Provided that such tender by demand draft is made a day prior to the due date

3. Any person ordered to pay money into Court shall present a lodgment schedule in the prescribed form to the Section Officer of the Accounts Section of the Registry for the issue of a chalan to enable him to make the payment into the Bank. The lodgment schedule shall be accompanied by a copy of the order directing the payment or shall bear a certificate from the Registrar endorsed thereon as to the amount to be paid and the time within which the payment is to be made.

4. On presentation of the lodgment schedule a chalan, in duplicate in the prescribed form, specifying the amount to be paid and the date within which it should be paid, but in no case exceeding ten days from the date of issue of the chalan, shall be issued by the Section Officer. Accounts Section, to the party directed to make the payment, who shall thereupon present the same at the Bank and make the payment. The Bank shall, on receiving payment, retain one copy of the chalan and return the other copy duly signed and dated acknowledging the receipt of the money, to the person making the payment. The Bank shall not accept the payment if the amount is tendered beyond the date mentioned in the chalan as the last date for payment.

5. On production of the copy of the chalan duly signed and acknowledged by the Bank as aforesaid, the person making the payment shall be given credit in the books maintained by the Accounts section of the Registry for the amount paid into the Bank, and a receipt signed by the Registrar shall be issued to him and the said chalan shall be retained in the Section.

6. The Section Officer of the Accounts Section shall keep a registrar cause-wise of all money, effects and securities of the suitors of the Court, which shall be ordered to be paid or delivered into or out of the Court. The purpose for which the deposit is made and the orders of attachment received, if any, of the funds, shall be duly entered in the register. No money shall be paid out of the funds in Court without an order of the Court.

7. Where a party seeks payment out of any monies in Court, he shall present an application to the Court for an order for payment. The application shall be accompanied by a Certificate of funds signed by the Registrar showing the amount, if any, standing to the credit of the suit, appeal or other proceeding from which payment out is sought and the claims and attachments, if any, subsisting thereon on the date of the certificate.

8. Upon an order being made for payment out, the party in whose favour the order is made shall apply to the Registrar for payment to him in accordance with the said order. The Registrar shall thereupon issue an order for payment in the prescribed form for the amount to be paid in favour of the party entitled to payment. The payment order shall be endorsed at the same time on the original chalan received from the Bank. The payment order together with the chalan duly endorsed for payment shall be handed over to the party entitled to payment who shall present the same at the New Delhi Treasury and obtain payment. Where however the entire amount of the chalan or the entire balance remaining unpaid thereunder is not to be out to the party, the original chalan shall not be handed over to him, but only a copy thereof endorsed for payment shall be given to him for presentation at the Treasury, the original chalan being retained in the Accounts Section until the funds are fully paid out.

9. The Section Officer, Accounts Section, shall check and tally the accounts maintained in the section every month with the monthly statements of receipts and payments to be received from the New Delhi Treasury and the Registrar shall certify under this signature every month that the accounts have been duly checked and tallied.

10. Nothing in this Order shall apply to the payment of fees relating to enrolment of advocates which may be paid into any Treasury or Sub-Treasury or the State Bank of India or the Reserve Bank to the credit of an account entitled XXI-Administration of Justice—Receipts of Supreme Court.

PART II—*Appellate Jurisdiction.*

(A) Civil Appeals.

ORDER XV.

APPEALS ON CERTIFICATE BY HIGH COURT.

1. Where a certificate has been given under clause (1) of Article 132 or clause (1) of Article 133 or Article 135 of the Constitution, the party concerned shall file a petition of appeal in the Court.

2. Subject to the provisions of sections 4, 5 and 12 of the Limitation Act, 1963 (XXXVI of 1963) the petition of appeal shall be presented within sixty days from the date of the grant of certificate of fitness.

3. (1) The petition shall recite succinctly and in chronological order with relevant dates, the principal steps in the proceedings leading up to the appeal from the commencement thereof till the grant of the certificate of leave to appeal to the Court, and shall also state the amount or value of the subject-matter of the suit in the Court of first instance and in the High Court, and the amount or value of the subject-matter in dispute before the Court with particulars showing how the said valuation has been arrived at. Where the appeal is incapable of valuation, it shall be stated.

(2) The petition shall be accompanied by a certified copy of the decree or order appealed from. It shall not be necessary to file along with the petition of appeal a certified copy of the certificate of fitness granted by the High Court, but the petition shall be supported by an affidavit stating the date on which the application for certificate was made to the High Court, the date of the order granting the said certificate and the provision of law under which the said certificate has been granted.

(3) Where at any time between the grant by the High Court of the Certificate for leave to appeal to the Court and the filing of the petition of appeal, any party to the proceeding in the Court below dies, the petition of appeal may be filed by or against the legal representative, as the case may be of the deceased party provided that the petition is accompanied by a separate application, duly supported by an affidavit, praying for bringing on record such person as the legal representative of the deceased party and setting out the facts showing him to be the proper person to be entered on the record as such legal representative.

4. The Registrar, after satisfying himself that the petition of appeal is in order, shall endorse the date of presentation of the petition and register the same as an appeal in the Court.

5. Where a party desires to appeal on grounds which can be raised only with the leave of the Court, it shall lodge along with the petition of appeal a separate petition stating the grounds so proposed to be raised any praying for leave to appeal on those grounds.

6. Within thirty days of the filing of the petition of appeal, the appellant shall deposit in the Court security for the costs of the respondent.

7. The security for the costs of the respondent shall be in the sum of two thousand rupees. The Court may in appropriate cases, enhance or reduce the amount of security to be deposited.

8. Where an appellant whose appeal has been registered in the Court fails to furnish the security within the time prescribed, or within such further time as the Court may allow, the Registrar shall call upon the appellant to show cause before the Court why the appeal should not be dismissed for non-prosecution.

9. The Court may after hearing the parties who have entered appearance dismiss the appeal for non-prosecution or give such other directions thereon as the justice of the case may require.

Appearance by Respondent

10. As soon as the security for the costs of the respondent has been deposited, the Registrar of the Court shall require the appellant—

(i) to furnish as many copies of the petition of appeal as may be considered necessary for record and for service on the respondent ; and

(ii) to send to the Registrar of the Court appealed from a copy of the petition of appeal for record in that Court and a copy for service upon the respondent or each respondent :

Provided that the Registrar of the Court may on an application made for the purpose, dispense with service of the petition of appeal on any respondent who did not appear in the proceedings in the Court appealed from or on his legal representative :

Provided however that no order dispensing with service of notice shall be made in respect of a respondent who is a minor or a lunatic :

Provided further that an order dispensing with service of notice shall not preclude any respondent or his legal representative from appearing to contest the appeal.

11. On receipt from the Court of the copy of the petition of appeal, the Registrar of the Court appealed from shall—

(i) cause notice of the lodgment of the petition of appeal to be served on the respondent personally or in such manner as the Court appealed from may by rules prescribe ;

(ii) unless otherwise ordered by the Court, transmit to the Court at the expense of the appellant the original record of the case ; and

(iii) as soon as notice as aforesaid is served, to send a certificate as to the date or dates on which the said notice was served.

12. A respondent shall enter appearance in the Court within thirty days of the service on him of the notice of lodgment of the petition of appeal.

13. The respondent may within the time limited for his appearance deliver to the Registrar of the Court and to the appellant a notice in writing consenting to the appeal, and the Court may thereupon make such order on the appeal as the justice of the case may require without requiring the attendance of the person so consenting.

Preparation of Record

14. (1) The record shall be printed in accordance with the rules contained in the First Schedule to these rules and, unless otherwise ordered by the Court, it shall be printed under the supervision of the Registrar of the Court :

Provided that where the proceedings from which the appeal arises were had in Courts below in a language other than English, the Registrar of the Court appealed from shall within three months from the date of the service on the respondent of the notice of petition of appeal transmit to the Court in triplicate a transcript in English of the record proper of the appeal to be laid before the Court, one copy of which shall be duly authenticated. The provisions contained in rules 15 to 20 shall apply to the preparation and transmission to the Court of the said transcript record

(2) Upon receipt from the Court appealed from of the English transcript of the record as aforesaid the Registrar of the Court shall require the appellant to deposit the charges for making further copies of the said transcript within such time as he may prescribe, but not exceeding twenty-eight days, and, with all convenient speed, arrange for the preparation thereof.

(3) Unless otherwise ordered by the Court, at least twenty copies of the record shall be prepared.

15. (1) As soon as the original record of the case is received in the Court, the Registrar shall give notice to the parties of the arrival of the original record.

(2) The appellant shall within four weeks of the service upon him of the notice referred to in sub-rule (1), file a list of the documents which he proposes to include in the paper book, a copy whereof shall be served on the respondent. The respondent may within three weeks of the service on him of the said list file a list of such additional documents as he considers necessary for the determination of the appeal

16 After the expiry of the time fixed for the filing of the additional list by the respondent, the Registrar shall fix a day for the settlement of list of documents to be included in the appeal record and shall give notice thereof to the parties who have entered appearance. In settling the lists the Registrar, as well as the parties concerned, shall endeavour to exclude from the record all documents that are not relevant to the subject-matter of the appeal and generally to reduce the bulk of the record as far as is practicable.

17. Where the respondent object to the inclusion of a document on the ground that it is not necessary or is irrelevant and the appellant nevertheless insists upon its inclusion, the record as finally printed shall, with a view to subsequent adjustment of cost of an incidental to the printing of the said document, indicate in the index of papers or otherwise the fact that the respondent has objected to the inclusion of the document and that it has been included at the instance of the appellant

18 Where the appellant objects to the inclusion of a document on the ground that it is not necessary or is irrelevant and the respondent nevertheless insists upon its inclusion, the Registrar, if he is of opinion that the document is not relevant, may direct that the said document be printed separately at the expense of the respondent and required the respondent to deposit within such time as he may prescribe, the necessary charges therefor, and the question of the costs thereof shall be dealt with by the Court at the time of the determination of the appeal

19 As soon as the index of the record is settled, the Registrar concerned shall cause an estimate of the costs of the preparation of the record to be prepared and served on the appellant and to require him to deposit within thirty days of such service the said amount. The appellant may deposit the said amount in lump-sum or in such instalments as the Registrar may prescribe

20 Where the record has been printed for the purpose of the appeal before the High Court and sufficient number of copies of the said printed record are available, no fresh printing of the record shall be necessary except of such additional papers as may be required

21. Where an appeal paper book is likely to consist of two hundred or less number of pages, the Registrar may, instead of having it printed, have the record cyclostyled under his supervision.

22. If at any time during the preparation of the record the amount deposited is found insufficient, the Registrar shall call upon the appellant to deposit such further sum as may be necessary within such further time as may be deemed fit but not exceeding twenty-eight days in the aggregate

23. Where the appellant fails to make the required deposit, the preparation of the record shall be suspended and the Registrar concerned shall not proceed with the preparation thereof without an order in this behalf of the Court and where the record is under preparation in the Court appealed from, of the Court appealed from

24. When the record has been made ready the Registrar shall certify the same and give notice to the parties of the certification of the record and append to the record a certificate showing the amount of expenses incurred by the party concerned for the preparation of the record

25 Each party who has entered appearance shall be entitled to three copies of the record for his own use.

26 Subject to any special direction from the Court to the contrary, the costs of, and incidental to, the printing of the record shall form part of the costs of the appeal, but the costs of, and incidental to, the printing of any document objected by one party in accordance with rule 18 or rule 19, shall, if such document is found, on taxation of costs, to be unnecessary or irrelevant, be disallowed to, or borne by the party insisting on including the same in the record.

27. Where the record is directed to be prepared under the supervision of the Registrar of the Court appealed from, the provisions contained in rules 15 to 25 shall apply *mutatis mutandis* to the operation thereof.

Special Case.

28. Where the decision of the appeal is likely to turn exclusively on a question of law, and party, with the sanction of the Registrar of the Court, may submit such question of law in the form of a special case, and the Registrar may call the parties before him, and having heard them and examined the record, may report to the Court as to the nature of the proceedings and the record that may be necessary for the discussion of the same. Upon perusing the said report, the Court may give such directions as to the preparation of the record and hearing of the appeal, including directions regarding the time within which or otherwise, the parties shall lodge their respective statement of case :

Provided that nothing herein contained shall in any way prevent this Court from ordering the full discussion of the whole case if the Court shall so think fit.

Withdrawal of Appeal.

29. Where at any stage prior to the hearing of the appeal an appellant desires to withdraw his appeal, he shall present a petition to that effect to the Court. At the hearing of any such petition a respondent who has entered appearance may apply to the Court for his costs.

Non-prosecution of Appeals—Change of Parties.

30. If an appellant fails to take any steps in the appeal within the time fixed for the same under these rules, or if no time is specified, it appears to the Registrar of the Court that he is not prosecuting the appeal with due diligence, the Registrar shall call upon him to explain his default and, if no explanation is offered, or if the explanation offered appears to the Registrar to be insufficient, the Registrar may issue a summons calling upon him to show cause before the Court why the appeal should not be dismissed for non-prosecution.

31. The Registrar shall send a copy of the summons mentioned in the last specified rule to every respondent who has entered appearance. The Court may, after hearing the parties, dismiss the appeal for non-prosecution or give such other directions thereon as the justice of the case may require.

32. Where at any time between the filing of the petition of appeal and the hearing of the appeal the record becomes defective by reason of the death or change of status of a party to the appeal, or for any other reason, an application shall be made to the Court, stating who is the proper person to be substituted or entered on the record in place of, or in addition to the party on record.

33. Upon the filing of such an application the Registrar of the Court shall, after notice to the parties concerned, determine who in his opinion is the proper person to be substituted or entered on the record in place of, or in addition to the party on record, and the name of such person shall thereupon be substituted or entered on the record :

Provided that no such order of substitution or revivor shall be made by the Registrar—

(i) where a question arises as to whether any person is or is not the legal representative of the deceased party, or

(ii) where a question of setting aside the statement of the cause is involved ; in such a case he shall place the matter before the Court for orders .

Provided further that where during the course of the proceedings it appears to the Registrar that it would be convenient for the enquiry that investigation in regard to the person who is to be substituted on record, be made by the Court appealed from or a Court subordinate thereto, the Registrar may place the matter before the Judge in Chambers and the Judge in Chambers may thereupon make an order directing the Court appealed from to investigate into the matter either itself or cause an enquiry to be made by a Court subordinate to it, after notice to the parties, and submit its report thereon to this Court within such time as may be fixed by the Order. On receipt of the report from the Court below the matter shall be posted before the Judge in Chambers again for appropriate orders.

34. Save as aforesaid the provisions of Order XXII of the Code relating to abatement shall apply *mutatis mutandis* to appeals and proceedings before the Court

35. (1) Within sixty days of the service on him of the notice of the authentication of the record, the appellant shall lodge in the Court the statement of his case and serve a copy thereof on the respondent. The respondent shall lodge his case within thirty days thereafter.

(2) No party to an appeal shall be entitled to be heard by the Court unless he has previously lodged his case in the appeal :

Provided that where a respondent, who has entered appearance, does not desire to lodge a case in the appeal, he may give the Registrar of the Court notice in writing of his intention not to lodge any case while reserving his right to address the Court on the question of costs only.

36. (1) The statement of a case shall consist of two parts as follows —

Part I shall consist of a concise statement of the facts of the case in proper sequence. A list of the dates of the relevant events leading up and concerning the litigation in chronological order and pedigree tables, wherever necessary, shall be given at the end of the part.

Part II shall set out the contentions of facts and law sought to be urged in support of the claim of the party lodging the case and the authorities in support thereof. Where authorities are cited, reference shall be given to the Official Reports, if available. Where text books are cited, the reference shall, if possible, be to the latest available editions. Where a statute, regulation, rule, ordinance or bye-law is cited or relied on, so much thereof as may be necessary to the decision of the case shall be set out. At the end of the part shall ordinarily be set out a table of cases cited.

(2) The case shall consist of paragraphs numbered consecutively. References shall be given by page and line to the relevant portions of the record in the margin and care shall be taken to avoid, as far as possible, the re-producing in the case of long extracts from the record. The case shall not travel beyond the limits of the certificate or the special leave, as the case may be, and of such additional grounds, if any, as the Court may allow to be urged on application made for the purpose. The Taxing Officer in taxing the costs of the appeal shall, either of his own motion, or at the instance of the opposite party, enquire into any unnecessary prolixity in the case, and shall disallow the costs occasioned thereby.

37. Two or more respondents may, at their own risk as to costs, lodge separate cases in the same appeal.

38. A respondent who has not entered appearance shall not be entitled to receive any notice relating to the appeal from the Registrar of the Court, nor allowed to lodge a statement of case in the appeal.

39. The appeal shall be set down for hearing one month after the expiry of the time prescribed for lodging the statement of cases by the respondent. Where a respondent fails to lodge the statement of case within the time prescribed, the appeal shall, subject to the provision in the proviso to rule 1, be set down *ex parte* against the respondent in default.

40. As soon as an appeal is set down for hearing, the appellant shall attend at the Registry and obtain eight copies of the record and cases to be bound in cloth or in one-fourth leather with paper sides, and six leaves of blank paper shall be inserted before the appellant's case. The front cover shall bear a printed label stating the title and Supreme Court Number of the Appeal, the contents of the Volume and the name and address of the advocates on record. The several documents, indicated by indicts, shall be arranged in the following order —

(1) Appellant's Case ;

(2) Respondent's Case ;

(3) Record (if in more than one Part, showing the separate Parts by indicts, all Parts being pagged at the top of the page) ;

(4) Supplemental Record (if any) and the short title and Supreme Court Number of Appeal shall also be shown on the back.

41. The appellant shall lodge the bound copies not less than ten clear days before the date fixed for the hearing of the Appeal.

ORDER XVI.

APPEALS BY SPECIAL LEAVE.

1. Where leave to appeal to the Court was refused in a case by the High Court, a petition for special leave to appeal to the Court shall, subject to the provisions of sections 4, 5, 12 and 14 of the Limitation Act, 1963 (XXXVI of 1963) be lodged in the Court within sixty days from the date of the order of refusal and in any other case within ninety days from the date of the judgment or order sought to be appealed from :

Provided that where an application for leave to appeal to the High Court from the judgment of a single judge of that Court has been made and refused, in computing the period of limitation in that case under this rule, the period from the making of that application and the rejection thereof shall also be excluded.

Explanation —For purposes of this rule the expression 'order of refusal' means the order refusing to grant the certificate referred under article 132 or article 133 of the Constitution on merits and shall not include an order rejecting the application on the ground of limitation or on the ground that such an application is not maintainable.

2. Where the period of limitation is claimed from the date of the refusal of a certificate under article 132 or article 133 of the Constitution, it shall not be necessary to file the order refusing the certificate, but the petition for special leave shall be accompanied by an affidavit stating the date of the judgment sought to be appealed from the date on which the application for a certificate of fitness to appeal to the Court was made to the High Court, the date of the order refusing the certificate, and the ground or grounds on which the certificate was refused and in particular whether the application for the certificate was dismissed as being out of time.

3. Where an appeal lies to the Court on a certificate issued by the High Court, no application to the Court for special leave to appeal shall be entertained unless the High Court concerned has first been moved and it has refused to grant the certificate.

4. The petition shall state succinctly and clearly all such facts as may be necessary to enable the Court to determine whether special leave to appeal ought to be granted and shall be signed by the advocate on record for the petitioner unless the petitioner appears in person. The petition shall also state whether the petitioner has moved the High Court concerned for leave to appeal against its decision, and if so, with what result.

5. The petition shall be accompanied by—

(i) a certified copy of the judgment and order appealed from, and

(ii) an affidavit in support of the statement of facts contained in the petition.

6. No annexures to the petition shall be accepted unless such annexures are certified copies of documents which have formed part of the record of the case in the Court sought to be appealed from.

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1965

JUDGES OF THE SUPREME COURT OF INDIA.

(1st July, 1965 to 31st December, 1965.)

Chief Justice.

The Hon'ble Mr. P. B. Gajendragadkar.

Puisne Judges.

The Hon'ble Mr. Justice A. K. Sarkar

”	”	K. Subba Rao.
”	”	K.N. Wanchoo
”	”	M. Hidayatullah.
”	”	J. C. Shah.
”	”	Raghubar Dayal (upto 26th October, 1965).
”	”	J. R. Mudholkar
”	”	S.M. Sikri
”	”	R. S. Bachawat
”	”	V. Ramaswami.
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any question of principle. The facts of the case before us have, however, presented some unusual features which had led us to technically interfere with the sentence of one year's imprisonment passed by the Chief Presidency Magistrate. The respondent was sentenced by the Presidency Magistrate on 24th April, 1963 and thereupon he started serving the sentence till the judgment of the High Court which was rendered on 10th December, 1963. The respondent was released the next day *i.e.*, 11th December, 1963. This Court granted Special Leave on 20th December, 1963 and thereafter an application made by the appellant-State, this Court directed the arrest of the respondent. The respondent was accordingly arrested and though the Magistrate directed his release on bail pending the disposal of the appeal in this Court, the respondent was unable to furnish the bail required and hence suffered imprisonment, though it would be noticed that such imprisonment was not in pursuance of the conviction and sentence passed on him by the Magistrate. Such imprisonment continued till 8th May, 1964 when the decision of this Court was pronounced, so that virtually the respondent had suffered the imprisonment that had been inflicted on him by the order of the Presidency Magistrate. In these circumstances, we directed that though the appeal was allowed, the sentence would be reduced to the period already undergone which was only a technical interference with the sentence passed by the Presidency Magistrate, though in substance it was not.

K.S.

Appeal allowed.

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